RULE 4. PROCESS

(a) Summons: Form. The summons shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(b) Same: Issuance. The summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (a) of this rule. The plaintiff's attorney shall deliver to the person who is to make service the original summons upon which to make return of service and a copy of the summons and of the complaint for service upon the defendant.

(c) Service. Service of the summons and complaint may be made as follows:

(1) By mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment form and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this paragraph is received by the sender within 20 days after the date of mailing, service of the summons and complaint shall be made under paragraph (2) or (3) of this subdivision.

(2) By a sheriff or a deputy within the sheriff's county, or other person authorized by law, or by some person specially appointed by the court for that purpose. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(3) By any other method permitted or required by this rule or by statute.

(d) Summons: Personal Service. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual other than a minor or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as prescribed above cannot be made with due diligence, may order service to be made by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode; or to be made by publication pursuant to subdivision (g) of this rule, if the court deems publication to be more effective.

(2) Upon a minor, by delivering a copy of the summons and of the complaint personally (a) to the minor and (b) also to the minor's guardian if the minor has one within the state, known to the plaintiff, and if not, then to the minor's father or mother or other person having the minor's care or control, or with whom the minor resides, or if service cannot be made upon any of them, then as provided by order of the court.

(3) Upon an incompetent person, by delivering a copy of the summons and of the complaint personally (a) to the guardian of the incompetent person or a competent adult member of the incompetent person's family with whom the incompetent person resides, or if the incompetent person is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by order of the court and (b) unless the court otherwise orders, also to the incompetent person.

(4) Upon a county, by delivering a copy of the summons and of the complaint to one of the county commissioners or their clerk or the county treasurer.

(5) Upon a town, by delivering a copy of the summons and of the complaint to the clerk or one of the selectmen or assessors.

(6) Upon a city, by delivering a copy of the summons and of the complaint to the clerk, treasurer, or manager.

(7) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district of Maine or to an

assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the United States District Court for the district of Maine and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency provided that any further notice required by statute or regulation shall also be given.

Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency, provided that any further notice required by statute or regulation shall also be given. If the agency is a corporation the copy shall be delivered as provided in paragraph (8) or (9) of this subdivision of this rule.

Upon any other public corporation, by delivering a copy of the summons and of the complaint to any officer, director, or manager thereof and upon any public body, agency or authority by delivering a copy of the summons and the complaint to any member thereof.

(8) Upon a domestic private corporation (a) by delivering a copy of the summons and of the complaint to any officer, director or general agent; or, if no such officer or agent be found, to any person in the actual employment of the corporation; or, if no such person be found, to the Secretary of State, provided that the plaintiff's attorney shall also send a copy of the summons and of the complaint to the corporation by registered or certified mail, addressed to the corporation's principal office as reported on its latest annual return; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, provided that any further notice required by the statute shall also be given.

(9) Upon a corporation established under the laws of any other state or country (a) by delivering a copy of the summons and of the complaint to any officer, director or agent, or by leaving such copies at an office or place of business of the corporation within the state; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, provided that any further notice required by the statute shall also be given.

(10) Upon a partnership subject to suit in the partnership name in any action, and upon all partners whether within or without the state in any action on a claim arising out of partnership business, (a) by delivering a copy of the summons and of the complaint to any general partner or any managing or general agent of the partnership, or by leaving such copies at an office or place of business of the partnership within the state; or (b) by delivering a copy of the summons and of the complaint to any agent, attorney in fact, or other person authorized by appointment or by statute to receive or accept service on behalf of the partnership, provided that any further notice required by the statute shall also be given.

(11) Upon the State of Maine by delivering a copy of the summons and of the complaint to the Attorney General of the State of Maine or one of the Attorney General's deputies, either (a) personally or (b) by registered or certified mail, return receipt requested; and in any action attacking the validity of an order of an officer or agency of the State of Maine not made a party, by also sending a copy of the summons and of the complaint by ordinary mail to such officer or agency. The provisions of Rule 4(f) relating to completion of service by mail shall here apply as appropriate.

(12) Upon an officer or agency of the State of Maine by the method prescribed by either paragraph (1) or (7) of this subdivision as appropriate, and by also sending a copy of the summons and of the complaint by ordinary mail to the Attorney General of the State of Maine.

(13) Upon all trustees of an express trust, whether within or without the state, in any action on a claim for relief against the trust, except an action by a beneficiary in that capacity, (a) by delivering a copy of the summons and of the complaint to any trustee, or by leaving such copies at an office or place of business of the trust within the state; or (b) by delivering a copy of the summons and of the complaint to any agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the trust, provided that any further notice required by the statute shall also be given.

(14) Upon another state of the United States, by the method prescribed by the law of that state for service of process upon it.

(e) Personal Service Outside State. A person who is subject to the jurisdiction of the courts of the state may be served with the summons and complaint outside the state, in the same manner as if such service were made within the state, by any person authorized to serve civil process by the laws of the

place of service or by a person specially appointed to serve it. An affidavit of the person making service shall be filed with the court stating the time, manner, and place of service. Such service has the same force and effect as personal service within the state.

(f) Service by Mail in Certain Actions.

(1) Outside State. Where service cannot, with due diligence, be made personally within the state, service of the summons and complaint may be made upon a person who is subject to the jurisdiction of the courts of the state by delivery to that person outside the state by registered or certified mail, with restricted delivery and return receipt requested, in the following cases: where the pleading demands a judgment that the person to be served be excluded from a vested or contingent interest in or lien upon specific real or personal property within the state, or that such an interest or lien in favor of either party be enforced, regulated, defined or limited, or otherwise affecting the title to any property.

(2) Divorce Cases. Service of the summons and complaint or a post-judgment motion may be made in an action pursuant to Chapter XIII of these Rules upon a person who is subject to the jurisdiction of the courts of the state by delivery to that person, whether in or outside the state, by registered or certified mail, with restricted delivery and return receipt requested.

(3) Service Completion. Service by registered or certified mail shall be complete when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused, provided that the plaintiff shall file with the court either the return receipt or, if acceptance was refused, an affidavit that upon notice of such refusal a copy of the summons and complaint was sent to the defendant by ordinary mail.

(g) Service by Publication.

(1) *When Service May Be Made.* The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service by publication in an action described in subdivision (f) of this rule, unless a statute provides another method of notice, or when the person to be served is one described in subdivision (e) of this rule.

(2) *Contents of Order.* An order for service by publication shall include (i) a brief statement of the object of the action; (ii) if the action may affect

any property or credits of the defendant described in subdivision (f) of this rule, a description of any such property or credits; and (iii) the substance of the summons prescribed by subdivision (a) of this rule. The order shall also direct its publication once a week for 3 successive weeks in a designated newspaper of general circulation in the county where the action is pending; and the order shall also direct the mailing to the defendant, if the defendant's address is known, of a copy of the order as published.

(3) *Time of Publication; When Service Complete.* The first publication of the summons shall be made within 20 days after the order is granted. Service by publication is complete on the twenty-first day after the first publication. The plaintiff shall file with the court an affidavit that publication has been made.

(h) Return of Service. The person serving the process shall make proof of service thereof on the original process or a paper attached thereto for that purpose, and shall forthwith return it to the plaintiff's attorney. The plaintiff's attorney shall, within the time during which the person served must respond to the process, file the proof of service with the court. If service is made under paragraph (c)(1) of this rule, return shall be made by the plaintiff's attorney filing with the court the acknowledgment received pursuant to that paragraph. The attorney's filing of such proof of service with the court shall constitute a representation by the attorney, subject to the obligations of Rule 11, that the copy of the complaint mailed to the person served or delivered to the officer for service was a true copy. If service is made by a person other than a sheriff or the sheriff's deputy or another person authorized by law, that person shall make proof thereof by affidavit. The officer or other person serving the process shall endorse the date of service upon the copy left with the defendant or other person. Failure to endorse the date of service shall not affect the validity of service.

(i) Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(j) Alternative Provisions for Service in a Foreign Country.

(1) *Manner.* When service is to be effected upon a party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that

country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to the individual personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) *Return.* Proof of service may be made as prescribed by subdivision (h) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Advisory Notes
June 2008

Rule 4(f)(2) is amended [effective January 1, 2009] to recognize that Rule 80 is abrogated and to cite to Chapter XIII of these Rules that now governs most Family Division and domestic relations actions. The amendment also recognizes that post-judgment motions may be served by this service by certified mail alternative.

Advisory Committee's Notes
December 4, 2001

Rule 4(f) is amended to permit service by registered or certified mail in action arising under Rule 80(a) regardless of whether the person to be served is in or outside the state. The former rule permitted such service only upon persons outside the state and only in actions for divorce or annulment. The intent of the amendment is to afford litigants, many of whom are *pro se*, an easy and inexpensive means of serving initial process.

Advisory Committee's Notes
May 1, 2000

In subdivision (1) and subdivision (2), the term "minor" is substituted for the term "infant."

Advisory Committee's Notes
1993

Rule 4(d)(10) is amended for conformity to recent statutory changes.

When Rule 4(d)(10) was adopted in 1967, Maine was among those states which did not recognize the "entity" theory of partnership. Thus, an action against a partnership on a partnership liability could be brought only against the individual partners. Rule 4(d)(10) was intended to simplify service of process in such an action by eliminating the necessity of personal service upon every partner named as a defendant in favor of service upon one partner or a general or managing agent of the partnership. *See* M.R. Civ. P. 4(d)(10) advisory committee's note, 1 Field, McKusick & Wroth, *Maine Civil Practice* 53-55 (2d ed. 1970); *Thurston v. Continental Casualty Co.*, 567 A.2d 922, 923-24 (Me. 1989).

Subsequently, the Legislature has provided specifically that both general and limited partnerships may sue and be sued in the partnership name. 31 M.R.S.A. §§ 160-A, 290-A, enacted by P.L. 1987, ch. 92. Accordingly, the present amendment expressly extends the service provisions of Rule 4(d)(10) to "a partnership subject to suit in the partnership name." Service upon such a partnership may be had "in any action," whether or not the claim can be said to have arisen "out of partnership business."

The rule continues to provide a means for service upon partners individually in a claim that does arise out of partnership business. This provision thus permits service against members of a partnership established in a state which does not recognize the entity theory. Service under the rule will also support jurisdiction against all partners as to their personal liability under the general law of partnership for claims that cannot be satisfied out of the partnership property. Note that the present rule is one of service of process only. While partners are not indispensable parties in an action on a partnership liability, they and the partnership are bound by a judgment only if formally named and joined as parties to the action. *See* 1 Field, McKusick & Wroth, *supra* § 4.4. The service provisions of the rule apply whether the partnership and partners are joined or are sued in separate actions.

In clause (a) of the rule, the amendment limits service to "general" partners. Limited partners, who under the Revised Uniform Limited Partnership Act, 31 M.R.S.A. §§ 401-527, are not individually liable for the obligations of the partnership and do not participate in control of the partnership business, do not have sufficient stake or responsibility to assure that service upon them will be adequate notice to general partners. *See* 31 M.R.S.A. § 433; *cf. id.* § 409(1).

Clause (b) of the rule incorporates as an alternative means of service upon a limited partnership the provisions of the Revised Uniform Limited Partnership Act for service upon a statutory agent. Thus, under 31 M.R.S.A. §409(l)(B), (C), service may be had upon the registered agent or any liquidating trustee of the partnership. If no registered agent has been appointed, or can be found, then the Secretary of State, by virtue of 31 M.R.S.A. § 409(2), is deemed the agent of the partnership for service of process. Similarly, under 31 M.R.S.A. § 410, the Secretary of State is deemed to be the agent for service of process upon a nonresident general partner. Similar provisions are made for service on foreign limited partnerships by 31 M.R.S.A. §§ 500-502.

The service provisions of the Revised Uniform Limited Partnership Act contain savings for other methods of service. *See* 31 M.R.S.A. § 409(3) (domestic limited partnership); § 500(4) (foreign limited partnership authorized to do business in the state); § 501(2) (foreign limited partnership not authorized to do business in the state). While there is no similar saving in 31 M.R.S.A. § 410 for service upon nonresident general partners of domestic limited partnerships, the methods therein prescribed are not in terms exclusive of service under Rule 4(d)(10)(a).

Advisory Committee's Notes
1992

Rule 4(c)(1) is amended to clarify the intent of the rule. As promulgated in 1990, Rule 4(c)(1) provided that, if no acknowledgement of service by mail is received by plaintiff within 20 days, service may be made by an officer or specially appointed person under Rule 4(c)(2). The amendment, substituting "shall" for "may," follows Federal Rule 4(c)(2)(C)(ii), upon which the Maine rule was based. The intention is to make clear that the original service by mail is invalid if no acknowledgment is received, and that service under paragraph (2) or (3) must be employed if jurisdiction of the defendant is to be obtained.

Rule 4(c)(3) is added to clarify the relationship between service by ordinary mail with acknowledgement under Rule 4(c)(1) and other methods. Service under Rule 4(c)(1) is an option that may be used initially against any defendant in lieu of the special service methods permitted or required by Rules 4(d)-(g), (j), and applicable statutes. Plaintiff may, however, choose at the outset to bypass Rule 4(c)(1) and make service initially by a method specifically provided by rule or statute for the type of defendant in question, which may be personal service or another method such as registered or certified mail. If service is attempted under Rule 4(c)(1) but fails for lack of acknowledgement, plaintiff must resort to either personal service or another method as appropriate in order to obtain jurisdiction.

Advisory Committee's Notes
1991

Rule 4(c), providing that service of process is to be made by a sheriff, a deputy, another person authorized by law, or a person especially appointed by the court, is replaced by new Rule 4(c). Under the new provisions, service of the summons and complaint may be made by mail with written acknowledgement of receipt. Simultaneous amendments to Rules 4A(c) and 4B(c) make clear that writs of attachment and summonses on trustee process must be served by a sheriff or deputy.

The change is intended to make service both more efficient and more economical. In many counties, delays occur because of the backlog of civil process in sheriffs' offices. In addition, the costs of service, which may be significant in cases involving multiple parties, can be reduced by making service by mail freely available to Maine litigants. Such service is now available in the federal and many state courts, and in Maine, under Rule 4(f), may be used against out-of-state defendants. Since the party serving the summons and complaint bears the burden of establishing that service has been made and the risk of loss if service is ineffective, it may be assumed that parties will continue to resort to service by officer in difficult cases.

Rule 4(c)(1) provides that in the first instance service of summons and complaint may be made by the party or any person acting for the party by ordinary first-class mail. The sender must include with the summons and complaint two copies of a form of notice designed to alert the recipient to the procedure and an acknowledgement of receipt of service to be returned by the recipient in a postage-paid envelope provided for that purpose. If the sender does not receive the acknowledgement within twenty days of the mailing of the summons and

complaint, the sender has the option of making service in hand under paragraph (2) of the subdivision. A form of notice and acknowledgement is being added to the Appendix of Forms as Form 3.20 by simultaneous amendment. Note that the acknowledgement must be received within 20 days of the mailing date, while the time for answer under Rule 12(a) is still 20 days from the date of service. In this case, the date on which the defendant mails the acknowledgement, which constitutes acceptance of this form of service, is the date of service for purposes of the time for answer.

Rule 4(c)(2) carries forward the language of former Rule 4(c) permitting service by a sheriff, a deputy, or "other person authorized by law," which includes constables and police and other governmental officers specifically authorized by statute. *See e.g.* 12 M.R.S.A. § 6025 (marine patrol officers); 34-A M.R.S.A. § 3231(H) (warden of the state prison). The clause in the present rule referring to the subpoena is deleted because Rule 4(c) will now apply only to service of summons and complaint. The provisions of the present rule for special appointment for service remain in effect.

Rule 4(h) is amended to conform to the provisions of new Rule 4(c) by providing for return of service when service is made by mail.

Advisory Committee's Notes
1990

Rule 4(d)(14) is added to make clear that service of process may properly be made under the Maine Rules of Civil Procedure upon one of the other 49 states of the United States in an appropriate case when that state requires service to be made upon it in a manner not otherwise provided in Rule 4(d). Service under this provision may be made outside Maine in accordance with Rule 4(e). The provision of Rule 4(j) for service upon any party in a foreign country by means appropriate under the law of that country would reach a result similar to that under Rule 4(d)(14) if a foreign country were a party.

Advisory Committee's Notes
1987

Rule 4(c) is amended to eliminate constables from the enumeration of those generally empowered to serve civil process. By statute, a constable's power to serve process is limited to his own town or "an adjoining plantation." 14 M.R.S.A. § 703. The rule as originally promulgated carried the implication that a constable

could serve process anywhere within the state. Under the amended rule, a constable may still serve process in a proper case as an "other person authorized by law."

Advisory Committee's Notes
1985

Rule 4(d)(8)(a) is amended to eliminate the requirement that, when service is made upon a domestic private corporation by delivery to the Secretary of State, the copy of the process sent to the corporation by registered or certified mail be sent return receipt requested, with instructions to deliver to addressee only. Since postal regulations require that an individual be named for delivery to addressee only, and there may be no current officer or director of a corporation that still has assets, the requirement may frustrate service. In this situation, the mailing is simply a backup to service upon the Secretary of State as statutory agent of the corporation and is not required by the statute. Therefore, elimination of the addressee-only requirement will cause no real diminution in the notice afforded. *See* 13-A M.R.S.A. § 305(2).

Advisory Committee's Notes
1981

Rule 4(e) is amended to make the rule more reflective of the present state of the law. As originally promulgated, the rule envisioned only two situations in which personal service might be had outside the state: service upon a domiciliary and service under the long-arm statute, 14 M.R.S.A. §704-A. Accordingly, the original rule limited such service expressly to cases involving domiciliaries and cases within the scope of the long-arm statute's language of submission to the jurisdiction. Plainly, there are other situations where out-of-state service is constitutionally valid, as well as appropriate-*e.g.*, jurisdiction by consent, or jurisdiction under jurisdictional provisions other than the long-arm statute, such as those in the Maine Business Corporations Act, 13-A M.R.S.A. § 306, or the Probate Code, 18-A M.R.S.A. §§ 4-301, 3-602, 5-208.

Rule 4(f) is amended to conform the rule to the effect of the decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977). Related amendments are being made in Rules 4A(f) and 4B(h).

In *Shaffer,* the Court overruled a line of cases founded on *Pennoyer v. Neff*, 95 U.S. 714 (1878), and exemplified by *Harris v. Balk*, 198 U.S. 215 (1905),

which had held that, by the attachment of the tangible or intangible property of a nonresident defendant within the state, the courts of a state acquired jurisdiction to render a judgment subjecting that property to a claim against the defendant, regardless of the connection of the claim with the property or the state. Rule 4(f) as originally promulgated provided a means of service in three such situations. *See* 1 Field, McKusick, and Wroth, *Maine Civil Practice* 4.11, 4A.6 (2d ed. 1970). *Shaffer* holds that this form of "quasi in rem" jurisdiction violates due process, and that a state can exercise jurisdiction over the property of a nonresident defendant only if he has sufficient contacts with the state to sustain jurisdiction of his person in the action.

Rule 4(f) in its original form was in effect a grant of jurisdiction over the property or status of the defendant in the three situations therein provided for, without regard to the contacts of the defendant. The effect of the present amendment is to limit service by mail to situations where jurisdiction is otherwise proper—that is, borrowing the language of Rule 4(e) as simultaneously amended, where defendant is "subject to the jurisdiction of the courts of the state." Thus the mere presence of property or a pending adjudication of marital status, within the state will no longer of itself be a basis for such service. In such cases, however, where the defendant has sufficient contacts with Maine related to the transaction in suit, so that service under the long-arm statute and Rule 4(e) would be proper, service may be had outside the state by mail in the two situations provided in amended Rule 4(f): (1) Where title or other interest in real or personal property is involved; (2) where the action is for divorce or annulment. Ordinarily, in these situations, there will be contacts. *See Shaffer v. Heitner*, *supra*, at 207-08.

Advisory Committee's Note
September 1, 1980

This rule is amended to provide a simple and efficient means of effectuating service on the United States or an agency thereof in a Maine court. The amendment is taken with only minor changes from Federal Rule 4(d)(4) and (5). Since federal statutes and regulations may contain provision for specific forms of service in particular classes of cases, language has been added similar to that in Rules 4(d)(8)-(10), (13), requiring that any form of notice specified in such a provision also be given.

Advisory Committee's Note
December 1, 1975

This amendment is made to conform to a change in the Postal Regulations effective February 13, 1975, which makes obsolete the present language of Rule 4(f) requiring "return receipt requested, with instructions to deliver to addressee only." The new regulation provides for "Restricted Delivery." Mail so marked may be delivered either to the addressee or to a person he specifically authorizes in writing to receive his Restricted Delivery mail. Authorization may be given by use of Form 3801, Standing Delivery Order, or by a letter to the postmaster. The sender may request on P.S. Form 3811 a Restricted Delivery return receipt for delivery to addressee only showing either (1) to whom and date delivered, or (2) to whom, date, and where delivered. Either form would satisfy this amendment.

Advisory Committee's Note
December 1, 1975

This amendment is designed to accomplish with respect to express trusts what Rule 4(d)(10) has done with respect to partnerships. Under Maine law a trust is not an "entity" which may sue and be sued as such. The trustees must sue and be sued and a judgment can be rendered only against them. This amendment does not change the requirement of joinder but eliminates the necessity of individual service upon each trustee. The purpose is to provide in actions on claims against a trust a means of serving process upon trustees that is less difficult and expensive than individual service, while fully satisfying the constitutional requirements of due process.

In these days the use of business trusts is increasing, notably in the field of real estate development, and it is as appropriate to simplify service here as in the case of partnerships. There is, moreover, no reason to differentiate between the trust created to undertake business activity and any other form of express trust, including testamentary trusts. Requiring the trust to be "express" prevents applicability of the amendment to implied or constructive trusts created by operation of law. The amendment will enable a plaintiff to use the simplified service on claims arising out of relations between the trust and third persons, such as tort or contract claims. The exclusion of actions by beneficiaries suing as such is to prevent the amendment from being used when the internal affairs of the trust are involved and the individual liability of a trustee may come in issue. Nor does the amendment provide for service on claims against trustees for breach of trust, for objectives such as restoration to the trust estate of assets wrongfully diverted from it.

Advisory Committee's Note

April 15, 1975

Paragraphs (11) and (12) are added to Rule 4(d) in order to specify the methods for making service upon the State of Maine and any officer or agency of the State. Service upon the State is made by service upon the Attorney General. This is parallel to Federal Civil Rule 4(d)(4). See also Rule 4(d)(2) of the Vermont Rules of Civil Procedure. Like the Federal Rule the new Maine Rule requires that in any action attacking the validity of an order of an officer or agency of the State of Maine not made a party, a copy of the summons and of the complaint just be mailed to that officer or agency. The new Maine rule, however, does go further than the Federal Rule in simplifying the form of service by permitting registered or certified mail upon the Attorney General (rather than personal service), and by permitting service by ordinary mail upon a state officer or agency which is not a party.

For service upon a State officer or agency Rule 4(d)(12) incorporates the existing procedure for service under either paragraph (1) or (7) with the added requirement that a copy of the summons and complaint also be sent by ordinary mail to the Attorney General. The evident purpose of both paragraphs (11) and (12) is to assure early notice to the Attorney General, who is charged with the defense of many such actions.

Advisory Committee's Note
November 1, 1969

A certificate of election of a corporation's clerk previously was filed in the registry of deeds in the county or district where the corporation was located or where it had a place of business or a general agent, but by 1965 Laws, c. 61, § 1 such certificates of election are now filed in the office of the Secretary of State. Accordingly, the "last resort" method of service upon a domestic private corporation by delivery to the registry of deeds has become inappropriate. Furthermore, it is doubtful whether the existing provision of Rule 4(d) (8) satisfies the requirements of due process. It can be said of delivery to a filing office even more truly than of publication that "it would be idle to pretend that [it] alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 658, 94 L.Ed. 865 (1950).

To meet these defects in the existing rule the "last resort" method of service is changed to be delivery to the Secretary of State accompanied by mailing of a

copy of the summons and of the complaint to the corporation at its principal office as reported on its latest annual return. This provision is comparable to that of Section 3–5(b) of the proposed Maine Business Corporation Act (West Pub. Co. 1969). That proposed Act directs the Secretary of State to cause the mailing immediately. Since it is thought that the rules cannot direct the Secretary of State to take action, responsibility for the mailing under the rule is left to the attorney for the plaintiff.

Advisory Committee's Note
December 31, 1967

Many substantial business enterprises are conducted today by partnerships. Many doing business in Maine, as, for example, accounting and insurance and stock brokerage firms, have a large number of partners, many or even most of whom reside outside the state. The new Rule 4(d) (10) is intended to afford, in actions arising out of partnership business, a means for serving process upon partners that is less difficult and expensive than the present ones, and that, at the same time, complies fully with the constitutional requirements of due process.

In Maine, where the common law of partnerships still prevails, suits by and against partnerships cannot be in a common name, but rather must be in the names of partners. Until Maine adopts the "entity theory" by rule or statute, the "persons composing [the partnership] must sue and be sued; and a judgment can only be rendered against them." *Macomber v. Wright*, 35 Me. 156, 157 (1852).

The new Rule 4(d) (10) does not change the *Macomber v. Wright* rule. It does not eliminate the necessity to name as defendants all partners whom the plaintiff wishes to hold on a partnership liability. However, it does eliminate the necessity of making personal service upon each and every one of the partners who are named as defendants. For the procedural purpose of service of process, the partners are treated by the amendment much the same as if they had elected the corporate form of doing business rather than the partnership. *Compare* subdivisions (d) (8) and (d) (9). Service upon one partner (or upon a general or managing agent of the partnership) will be effective as service upon all partners sued on a partnership liability.

Under the existing procedure, service may be made upon a partner only by service upon him personally by the method provided in Rule 4(d) (1), subject to other methods being available in limited circumstances. Even if all members of the partnership are Maine residents such requirements for service are onerous in

the case of any partnership of more than two or three partners. When many of the partners reside outside the state, even though personal service upon such non-resident partners is expressly authorized by Maine's "long-arm" statute (the 1959 Jurisdiction Act) as to most causes of action arising in Maine (14 M.R.S.A. § 704), the complications involved in getting personal service upon many different partners, often residing in many different states, can for practical purposes deny justice to meritorious claims against the partnership.

On causes of action arising out of the doing within Maine by one partner or an agent of the partnership of any of the acts listed in the 1959 Jurisdiction Act, such as the transaction of any business or the commission of a tortious act, all partners are by that Act declared to have submitted themselves to the jurisdiction of the courts of this state. The particular mode for serving process provided by the Act is expressly stated not to limit or affect "the right to serve any process in any other manner now or hereafter provided by law." 14 M.R.S.A. § 704(4). The Committee is confident that the method for making service provided in the new subdivision (d) (10) satisfies due process. *Cf. Henry L. Doherty & Co. v. Goodman,* 294 U.S. 623, 55 S.Ct. 553, 79 L.Ed. 1097 (1935). The Federal Rules and the rules of states following the entity theory of partnerships permit process to be served as prescribed in the new subdivision. *See* F.R. 4(d) (3); N.J.Rule 4.4-4(e); Minn.Rule 4.03(b); McKinney's N.Y. CPLR § 310. There is no factual or substantive law difference that would make such service adequate in giving the partners due notice of the action under the entity theory, but would render such service inadequate in Maine with its common law concept of the partnership. Indeed Maine already permits service upon partners by less than personal service upon all, in two limited situations: (1) Rule 4B (c), preserving the substance of a pre-rules statute, makes service of trustee process on one partner an effective attachment as to any of the defendant's property in the hands of the firm; and (2) Rule 4(j) (1), added in 1966 after careful study by both those concerned with federal rulemaking and those here in Maine, permits service upon a partnership in a foreign country by delivery to a managing or general agent.

In this day of mammoth partnerships, it may be difficult for the plaintiff's attorney to determine the names of all the parties. With the new subdivision (d) (10), it would appear permissible for him then to caption his suit by the style "John Smith v. James Jones, Henry Richards and all other persons who are partners of James Jones and Henry Richards in the partnership known as `Jones & Company'." The plaintiff could, through discovery against Jones and Richards determine the names of all other partners and could amend his complaint prior to trial so as to include those defendants specifically. The original service upon either

Jones or Richards or a general or managing agent of the partnership would have been effective to give them the constitutionally required notice of the action and of its application to them.

Reporter's Notes
December 1, 1959

This rule is a combination of Federal Rule 4, existing Maine statutes, and new provisions designed to simplify and improve methods of serving process.

Rule 4(a) prescribes the form of the summons and is substantially the same as Federal Rule 4(b). *See* Form 1 in the Appendix of Forms. The reference to the facsimile signature of the clerk is inserted to make it clear that R.S.1954, Chap. 106, Sec. 9 [now 4 M.R.S.A. § 108], is not superseded by the rule. Alternate Form 1 in the Appendix of Forms is provided so that the clerk in one county may issue a summons for the commencement of an action in another county. Alternate Forms 2 and 2A are provided for the same reason.

Rule 4(b) places upon the plaintiff's attorney the obligation to fill out the summons, which he procures in blank from the clerk, and to make the necessary copies of both summons and complaint. It is also provided that in all cases the plaintiff's attorney shall deliver the papers to the officer for service. This departs from the Federal Rules, which require the clerk to prepare the summons and deliver it to the officer for service. It does not seem desirable to put this additional burden upon the clerk's office.

Rule 4(c) provides for service by presently authorized officers or by a person specially appointed by the court, the latter being taken from Federal Rule 4(c).

The general statutes relating to method of service of process, R.S.1954, Chap. 112, Sec. 17ff, have been repealed and service of process will in general be governed by Rule 4(d) to (i), inclusive.

Rule 4(d) (1) changes the requirements for personal service upon an individual by eliminating the possibility that the process may be left at the last and usual place of abode without delivery of it to any person. The present practice of sliding the process under the door of an empty house is subject to possible abuse. The last sentence provides, however, that the court may order service to be made by leaving the process at the defendant's dwelling house or usual place of abode upon a showing that the prescribed service cannot be made with due diligence.

This is designed to cover the situation where the officer might have to make repeated attempts to serve a defendant who was trying to evade service. It is intended as an alternative for rare cases and contemplates a substantial showing by the plaintiff. Because of the possibility that leaving the process at an empty house might in the particular circumstances be less effective than publication, the court may order service by the latter method (which would normally be accompanied by mailing the published notice to the defendant's address).

Service by reading the writ or original summons to the defendant, as provided in R.S.1954, Chap. 112, Sec. 18, is not preserved in the rule.

The reference to service on an agent "authorized by appointment or by law to receive service", taken from Federal Rule 4(d) (1), covers the situation where a defendant individual has made an actual appointment, whether voluntary or under compulsion of a statute such as R.S.1954, Chap. 84, Sec. 10 [now 32 M.R.S.A. § 4002] (non-resident real estate brokers and salesmen). It also covers situations where no appointment has been made in fact, but where the doing of an act within the state is given the effect of appointing a public official as agent for service. R.S.1954, Chap. 22, Sec. 70, as amended [now 29 M.R.S.A. § 1911] (non-resident operators of motor vehicles and aircraft), is such a statute. When service is on a statutory agent, such further notice as the statute requires shall be given.

Rule 4(d) (2) to (9), inclusive, incorporates to a large extent the repealed statutes for service of process, but with some simplifications and modifications. As in the case of individuals, corporations may be served through an agent authorized by appointment or statute to receive such service on behalf of the corporation. This has the effect of retaining the numerous provisions scattered through the Revised Statutes which either require the designation of an agent for service of process as a condition of engaging in business activity in the state or provide that service upon a named public official shall be sufficient. Any further notice required by the statute shall also be given. These requirements for service and notice vary from statute to statute without apparent reason, but it has seemed preferable to retain them as they are rather than to substitute a single uniform method of service.

Rule 4(e) also provides that service may be made outside the state upon a person who has submitted to the jurisdiction of the courts of the state. The word "person" includes a corporation. R.S.1954, Chap. 10, Sec. 22 (XIV) [now 1 M.R.S.A. § 72]. Taken in connection with 1959 Laws, c. 317, § 125, which

becomes R.S.1954, Chap. 112, Sec. 21, as amended [now 14 M.R.S.A. § 704] this provision significantly extends the jurisdiction of the courts of Maine.

The purpose is to make a non-resident who comes into Maine and commits a tort or fails to perform a contract answerable for that wrong in the Maine courts even though he departs from the state before he can be served with process. It is an extension of the principle of the familiar non-resident motor vehicle statute (R.S.1954, Chap. 22, Sec. 70 [now 29 M.R.S.A. § 1911]). Under the 1959 amendment, a defendant can be personally served outside the state and a personal judgment rendered against him, on which he can of course be sued in his home state. At present jurisdiction cannot be obtained over such a non-resident without personal service in the state; but if his property can be attached, judgment good only against that property can be had. *Martin v. Bryant*, 108 Me. 253, 80 A. 702 (1911).

This statute is borrowed with slight change from Illinois Revised Statutes, Chap. 110, Par. 17, the constitutionality of which has been upheld in that state, *Nelson v. Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957), and it is believed that the United States Supreme Court would also uphold it. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945) ; *McGee v. International Life Ins. Co.*, 355 U.S. 220, 78 S.Ct. 199 (1957) ; and *see Smyth v. Twin State Improvement Corp.*, 116 Vt. 569, 80 A.2d 664 (1951) (upholding a Vermont statute making the commission of a single tort a basis of jurisdiction over a foreign corporation). Moreover, it seems eminently fair to provide that a person who comes to Maine and commits a wrongful act shall by so doing submit himself to the jurisdiction of the Maine courts, rather than to require the Maine resident whom he has wronged to pursue him to his home state. Maine being the place of the wrong, it is presumably the most convenient place to assemble the witnesses for trial.

Rule 4(f) deals with service by mail outside the state. It is limited to cases (1) where the plaintiff has made an attachment or served a trustee writ within the state, (2) where the object of the action is to affect the defendant's title to real or personal property within the state, or (3) in divorce or annulment actions. In these cases the out-of-state service is not the basis for a personal judgment, but it satisfies due process requirements of notice so that a judgment affecting the defendant's property or status is effective. *Plurede v. Levasseur*, 89 Me. 172, 36 A. 110 (1896) (notice of enforcement of lien). If the address of a person to be served is unknown or if the rights of unknown claimants are involved, publication under Rule 4(g) can be used. In such a case publication satisfies due process.

Rule 4(g) deals with service by publication, which is permitted only upon a showing that service cannot be made by another prescribed method. These rules recognize, as Mr. Justice Jackson did in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652, 658 (1950), that "it would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts." The typical situation for service by publication will be when the whereabouts of the person to be served cannot be ascertained with due diligence.

Rule 4(h) provides that the proof of service shall be made on the original process and that the person making the service shall return it to the plaintiff's attorney, who has the duty to file it with the court within the time during which the defendant must answer the complaint. Since it is the attorney's responsibility to make sure that the service and proof thereof were proper, it seems wise to have the process returned to him instead of having the officer return it to the court. It is not necessary that the original complaint be delivered to the officer who serves the copy. *See* the third sentence of Rule 4(h).

Rule 4(i) is not covered by any existing statute, but is consistent with the general common law rule, and apparently with Maine practice. *Cf. Glidden v. Philbrick*, 56 Me. 222 (1868); *Fairfield v. Paine*, 23 Me. 498 (1844).

RULE 4A. ATTACHMENT

(a) Availability of Attachment. In any action under these rules, real estate, goods and chattels and other property may, in the manner and to the extent provided by law, but subject to the requirements of this rule, be attached and held to satisfy the judgment for damages and costs which the plaintiff may recover. Attachment under this rule shall not be available before judgment in any action against a consumer for a debt arising from a consumer credit transaction as defined in the Maine Consumer Credit Code.

(b) Writ of Attachment: Form. The writ of attachment shall bear the signature or facsimile signature of the clerk, be under the seal of the court, contain the name of the court, the names and residences of the parties and the date of the complaint, be directed to the sheriffs of the several counties or their deputies, and command them to attach the goods or estate of the defendant to the value of a specified amount ordered by the court, or to attach specific property of the defendant designated by the court, and to make due return of the writ with their

doings thereon. The writ of attachment shall also state the name of the justice or judge who entered the order approving attachment of property, if any, and the date thereof.

(c) Same: Service. The writ of attachment may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The writ of attachment shall be served by a sheriff or a deputy within the sheriff's county. The plaintiff's attorney shall deliver to the officer making the attachment the original writ of attachment upon which to make return and a copy thereof.

No property may be attached unless such attachment for a specified amount is approved by order of the court. Except as provided in subdivision (g) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the aggregate sum of the attachment and any liability insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process shown by the defendant to be available to satisfy the judgment.

An attachment of property shall be sought by filing with the complaint a motion for approval of the attachment. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule. Except as provided in subdivision (g) of this rule, the motion and affidavit or affidavits with the notice of hearing thereon shall be served upon the defendant in the manner provided by Rule 4 at the same time the summons and complaint are served upon that defendant. In the case of an attachment approved ex parte as provided in subdivision (g) of this rule, the defendant shall also be served with a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of execution of the attachment or, if attachment has been perfected by filing under 14 M.R.S.A. § 4154, with a copy of the order of approval with the acknowledgment of the officer receiving the filing endorsed thereon.

A defendant opposing a motion for approval of attachment shall file material in opposition as required by Rule 7(c). If the defendant is deemed to have waived all objection to the motion as provided in Rule 7(c) for failure to file opposition material within the time therein provided or as extended, the court shall, without hearing, upon a finding that the plaintiff is entitled to an attachment under the

terms of this subdivision (c), enter an order of approval of attachment in an appropriate amount.

Any attachment shall be made within 30 days after the order approving the writ of attachment. When attachments are made subsequent to service of the summons and complaint upon the defendant, a copy of the writ of attachment with the officer's endorsement thereon of the date or dates of the attachments shall be promptly served upon the defendant in the manner provided by Rule 5. When an attachment made subsequent to the service of the summons and complaint has been perfected by filing under 14 M.R.S.A. § 4154, a copy of the order of approval, with the acknowledgment of the officer receiving the filing endorsed thereon, shall be promptly served upon the defendant in the same manner.

(d) Approval of Limited Attachment or Substituted Security.

(1) *Attachment of Specific Property.* In the order approving an attachment, the court shall specify that the attachment is to issue solely against particular property or credits upon a showing by the defendant (A) that the property or credits specified are available for attachment and would, if sold to satisfy any judgment obtained in the action, yield to the plaintiff an amount at least equal to the amount for which attachment is approved in accordance with the criteria of subdivision (c), and (B) that the absence of such a limitation will result in hardship to the defendant.

(2) *Alternative Security for a Single Defendant.* At the hearing on a motion for approval of an attachment against the property of a single defendant, the defendant may tender cash or bond at least equal to the amount of any attachment to be approved in accordance with the criteria of subdivision (c). If the court finds that the defendant has tendered cash in sufficient amount, it shall order that amount to be deposited with the court as provided in Rule 67 to be held as security for any judgment that the plaintiff may recover. If the court finds that the defendant has tendered a bond of sufficient amount and duration and with sufficient sureties, the court shall order the bond to be filed with the court. A surety upon a bond filed under this rule is subject to the terms and conditions of Rule 65(c). Upon such deposit or filing, the court shall further order that any prior attachment against the defendant to satisfy a judgment on the claim for which security has been tendered shall be dissolved. Thereafter, no further attachment shall issue against the defendant except on motion of the plaintiff and a showing that the cash deposited or bond filed has become inadequate or unavailable to satisfy the judgment.

(3) *Single Security for Multiple Defendants*. At the hearing for approval of attachment against the property of two or more defendants alleged to be jointly and severally liable to the plaintiff, one or more of the defendants may tender cash or bond sufficient, in the aggregate, to satisfy the total amount the plaintiff would be entitled to recover upon execution against all such defendants. Upon the findings required by paragraph (2) of this subdivision for a single defendant, the court may order the cash to be deposited or the bond filed with the court on the same conditions and with the same effect provided in that paragraph.

(e) Attachment on Counterclaim, Cross-Claim or Third-Party Complaint. An attachment may be made by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim.

(f) Subsequent or Additional Attachment. If no writ of attachment has issued, or if the time period prescribed in subdivision (c) of this rule for making attachments has expired, the court on motion may issue an order of approval for attachment of real estate, goods and chattels or other property. The provisions of subdivisions (c), (d), and (g) of this rule apply to the motion and any attachment ordered thereunder, except that notice if appropriate shall be served upon the defendant in the manner provided in Rule 5.

(g) Ex Parte Hearings on Attachments. An order approving attachment of property for a specific amount may be entered ex parte only in an action commenced by filing the complaint with the court together with a motion for approval of the attachment as provided in subdivision (c) of this rule. The hearing on the motion shall be held forthwith. Such order shall issue if the court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the attachment and any insurance, bond, or other security, and any property or credits attached by other writ of attachment or by trustee process known or reasonably believed to be available to satisfy the judgment, and that either (i) there is a clear danger that the defendant if notified in advance of attachment of the property will remove it from the state or will conceal it or will otherwise make it unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will damage or destroy the property to be attached. The motion for such ex parte order shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which the attorney knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney

shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in subdivision (i) of this rule.

(h) Dissolution or Modification of Attachments. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in property that has been attached pursuant to an ex parte order entered under subdivision (g) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the dissolution or modification of the attachment, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit.

Upon motion and notice and a showing by any defendant that specific property or sufficient cash or bond is available to satisfy a judgment as provided in subdivision (d) of this rule, the court may modify an order of attachment, whether issued ex parte or after hearing, to limit the attachment to particular property or to order cash or bond to be held by the court as security for the judgment, and to dissolve the prior attachment as to all other property of the defendant. If a prior attachment has been perfected as to property specified in the modified order, the modified order shall relate back to the original attachment.

Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of an attachment that is otherwise available by law.

(i) Requirements for Affidavits. Affidavits required by this rule shall set forth specific facts sufficient to warrant the required findings and shall be upon the affiant's own knowledge, information or belief; and, so far as upon information and belief, shall state that the affiant believes this information to be true.

Advisory Committee's Notes
May 1, 2000

The specific statutory citation in subdivision (a) is replaced by the general reference to the Maine Consumer Credit Code so that the Rules are not impacted by statutory changes.

Advisory Committee's Notes
1993

Rule 4A(c) as amended effective February 15, 1992, is further amended to eliminate the 10-day period for filing material in opposition to a motion. Under the amended rule, filing will be subject to the 21-day period provided by Rule 7(c) for all types of motions. Experience under the rule as originally adopted indicated that the 10-day period was unrealistically short for parties to obtain counsel, in light of the 20 days allowed for answer. The change will not significantly affect the purpose of the 1992 amendment to assure expeditious proceedings.

Advisory Committee's Notes
1992

Rule 4A is amended in a number of respects to address growing concerns of both bench and bar that the standards for granting attachment were not stringently or consistently applied and that the procedure was too cumbersome. Simultaneous amendments to the same effect have been made in Rule 4B. Forms 6.10 and 6.20 are simultaneously amended for conformity with the amendments to Rules 4A and 4B.

Rule 4A(b) is amended to make the writ of attachment consistent with existing provision of Rule 4A(c) that an order granting an attachment fixes the amount of the attachment and to take into account the prospect that under new Rule 4A(d)(1) an order granting an attachment may be limited to specific property.

Rule 4A(c) is amended to change the "reasonable likelihood" standard to one requiring a showing that it is "more likely than not" that the plaintiff will recover judgment in an amount that equals or exceeds "the aggregate sum" of the attachment sought and other available security. The latter phrase is included in the amendment to make clear that the amount to be approved for attachment is the difference between the amount of the potential judgment that the court finds to be "more likely than not" and the other security.

The change in the standard for attachment responds to prevailing concerns that attachments are too freely given under the existing standard. The "reasonable likelihood" standard was intended only as a constitutional minimum. *See* M.R. Civ. P.. 4A Advisory Committee's Note to January 1973 amendment, 1 Field, McKusick & Wroth, *Maine Civil Practice* 62 (2d ed. Supp. 1981). As the Law Court has recently affirmed, that standard "requires only that the plaintiff claim 'is not of such insubstantial character that its invalidity so clearly appears as to foreclose a reasonable possibility of recovery,'" and abuse of discretion in the trial

court application of the standard will be found only where the record shows "that the plaintiff had 'virtually no chance of recovery'" on the claim. *Bay of Naples Condominium Ass'n v. Lewis,* 582 A.2d 1210, 1212 (Me. 1990), quoting *Northeast Inv. Co. v. Leisure Living Communities, Inc.,* 351 A.2d 845, 852 (Me. 1976); *Herrick v. Theberge,* 474 A.2d 870, 874 (Me. 1984). *See also Precision Communications, Inc. v. Rodrigue,* 451 A.2d 300, 301 (Me. 1982); *DiPietro v. Casco N. Bank,* 490 A.2d 215, 218 (Me. 1985); *Barrett v. Stewart,* 456 A.2d 10, 11 (Me. 1983); *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 (Me. 1981).

The present amendment is adopted as a matter of policy rather than constitutional mandate. The constitutional minimum has not changed. *See Connecticut v. Doehr*, --- U.S. ---, 111 S.Ct. 2105, 2114, 115 L.Ed.2d 1 (1991). The purpose of the increased standard is to strike a more even balance between plaintiff and defendant in the use of attachment. Its effectiveness in achieving this goal will be subject to continuing review.

Under the "reasonable likelihood" standard, it was expressly held that plaintiffs need not show that it was more likely than not that they would prevail. *See Northeast Inv. Co. v. Leisure Living Communities, Inc*., *supra*; *Bowman v. Dussault*, 425 A.2d 1325, 1328 (Me. 1981). Under the amended standard that showing will be required. A moving party must show a greater than 50% chance of prevailing. This change in the threshold for obtaining an attachment, which applies to the showing of success on both liability and damage issues, will not cause the procedure for obtaining an attachment to be more complicated. No other change in the practice is intended. The type of evidence to be submitted will be the same as under existing law. The required showing is to be made through affidavits; there is no right to an evidentiary hearing. *Atlantic Heating Co., Inc. v. John Lavin,* 572 A.2d 478, 479 (Me. 1990). As under existing law, specificity is required in the showing for the amount of the attachment, and this amount cannot be offset by claims of the non-moving party. *See Casco N. Bank, N.A., et al. v. New England Sales, Inc., et al.*, 573 A.2d 795, 797 (Me. 1990).

To expedite proceedings, Rule 4A(c) is further amended to provide a kind of default procedure. An attachment "in an appropriate amount" will be ordered without hearing if there is no opposition filed in accordance with Rule 7(c) within ten days after service of the motion and if the plaintiff affidavit shows on its face that the claimed recovery is "more likely than not."

The Advisory Committee originally proposed that Rule 4A(c) also be amended by adding provisions requiring plaintiff to schedule a hearing with the clerk and providing that the hearing on an attachment with notice should be scheduled on an expedited basis, "at the earliest possible date requested by the plaintiff" more than 20 days after service on the defendant. *See* Advisory Committee on Civil Rules, *Annual Report*, p. 2 and Appendix A (10/29/91). The proposed amendment was intended to eliminate extensive delays in obtaining hearings on notice that had caused counsel to seek ex parte attachments in cases where they were not necessary or warranted. The Court, recognizing the need for expedited hearings, prefers to achieve the goal by administrative means. If delays persist, the Court will consider appropriate further amendment of the rule.

A new Rule 4A(d) is added concerning the attachment of specific property and substitution of security. Rule 4A(d)(1) explicitly requires the motion justice to limit the attachment to certain specific property or credits upon a showing by the defendant that the property or credits offered by the defendant are adequate and available to satisfy the judgment and that, otherwise, hardship to defendant will result. The showing of adequacy should value the offered property under the assumption that a sale may take place upon execution of a judgment. Under present law, the Superior Court has some limited discretion to select particular property or credits to be attached but is not required to exercise that discretion. *Compare Maine National Bank v. Anderschat,* 462 A.2d 482 (Me. 1983), *with Sinclair v. Anderson,* 473 A.2d 872, 874-75 (Me. 1984). The amendment is intended to prevent inequities that may arise if the motion justice cannot specify limitations on the attachment upon an appropriate showing of the defendant. However, the defendant must justify the need to go through that exercise based on a showing that prejudice would occur in the absence of such limitations.

New Rule 4A(d)(2) permits substitution of a bond or cash for an attachment consistent with the bonding provision of 14 M.R.S.A. § 4613. The amendment makes clear that this substitution can occur before the fact, at the attachment hearing, as well as after the attachment has actually been issued. The paragraph also sets forth procedural guidelines, incorporating existing provisions of Rules 67 and 65(c).

New Rule 4A(d)(3) allows a single bond or cash to be substituted for multiple attachments against defendants alleged to be jointly and severally liable to the plaintiff on a single debt. The intent of the provision is to eliminate the potential for over-securing a single debt, which can occur under present law. *See Chase Commercial Corp. v. Hamilton & Son,* 473 A.2d 1281 (Me. 1984).

The remaining subdivisions of the rule are redesignated "(e)" through "(i)."

Redesignated Rule 4A(f) is amended to make clear that the provisions of new Rule 4A(d) for limitation to specific property and substitution of security apply to additional or subsequent attachments.

Redesignated Rule 4A(g), covering hearings on attachments, is amended to provide that the hearing on an ex parte motion should be held "forthwith"; to substitute the "more likely than not" standard for the "reasonable likelihood" showing; and to incorporate the "aggregate sum" language of amended Rule 4A(c).

Redesignated Rule 4A(h) is amended to allow an existing attachment, whether ex parte or on notice, to be modified by substitution of specific property, cash or bond in the manner provided by new Rule 4A(d) for obtaining initial attachments.

Advisory Committee's Notes
1991

Rule 4A(c) is amended for consistency with new M.R. Civ. P.. 4(c) adopted simultaneously. Under that Rule, service of the summons and complaint may now be made by mail with notice and acknowledgement. The present amendment makes clear that a writ of attachment may be served only by a sheriff or deputy. *See* Rule 4A(b).

Advisory Committee's Notes
1988

Rule 4A(c) is amended for consistency with 14 M.R.S.A. § 4154, as amended by P.L. 1983, ch. 125; P.L. 1985, ch. 187. That section now permits real or personal property subject to attachment to be attached by filing an attested copy of the court's order of approval in the registry of deeds for the county where real property is located or, for personal property, in the filing office appropriate under 11 M.R.S.A. § 9-401(l). The order is to be filed within 30 days after its entry unless the court allows additional time on motion. Recording or filing fees are to be paid as for other documents. The statute expressly provides that filing constitutes perfection of the attachment and requires service of a copy of the court order upon the defendant "in accordance with the Maine Rules of Civil Procedure pertaining to service of writs of attachment."

The amendment to the rule addresses two questions. First, it provides, in the third paragraph of subdivision (c), that when an attachment which has been ordered ex parte is perfected by filing under the statute, the defendant is to be served with a copy of the order of approval containing the filing officer's acknowledgement of receipt, rather than with the writ of attachment itself. The second situation is that in which an attachment is made after the filing of the summons and complaint, whether upon ex parte order or after order of approval granted upon motion and affidavits served with the summons and complaint. In such a case, when the attachment has been perfected by filing under the statute, an amendment to the fourth paragraph of subdivision (c) provides that a copy of the order of approval with acknowledgement of filing is to be served upon the defendant in the same manner as a copy of the writ and return are served in the case of a possessory attachment.

In both situations, the effect of the statute is that no writ of attachment is prepared. It is service of the order, rather than the writ, which gives the defendant notice of the attachment.

Advisory Committee's Notes
1981

Rule 4A(c) as originally promulgated required that an action in which attachment was sought could be commenced only by filing the complaint -- the second method provided in Rule 3. Experience under the rule has shown that there is no practical purpose to this limitation and that inconvenience arises from it. Accordingly, Rule 4A(c) is amended to permit the action to be commenced by either service or filing. Whichever method is used, the procedure is the same: the motion for approval of attachment and its supporting affidavits must be filed with the complaint and served with the summons and complaint, regardless of the order in which these steps are taken. Of course, attachment subsequent to the commencement of the action may still be had under Rule 4A(e).

Rule 4A(c) is also amended to make clear that for attachment to be appropriate a plaintiff's probable recovery must exceed the amount, not only of available liability insurance, but of any other fund available to satisfy the judgment.

Rule 4(f) is amended to take account of the decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), that attachment of assets at the commencement of an action is

no longer a constitutionally valid way of obtaining jurisdiction over a nonresident in the absence of any other contacts with the state. *See* Advisory Committee's Note to simultaneous amendment of Rule 4(f).

The present amendment deletes as a ground for ex parte attachment the fact that the defendant is not personally subject to the jurisdiction. That provision is no longer needed or appropriate, because under *Shaffer* the fact of absence by itself will not support jurisdiction. In a case in which under the long-arm statute, 14 M.R.S.A. § 704-A, defendant is subject to jurisdiction and service, he can be served personally under Rule 4 (e), by mail if appropriate under amended Rule 4 (f), or by publication if necessary under Rule 4(g). Attachment can then be sought on notice and hearing under Rule 4A(c). Only if there is danger that defendant will abscond with or imperil the security, may ex parte attachment issue under Rule 4A(f) as here amended.

Rule 4A(f) is also amended for consistency with the simultaneous amendment of Rule 4A(c). The amendment limits the availability of ex parte attachment to actions commenced by filing the complaint -- except when subsequent attachment is appropriate under Rule 4A(e). The amended rule makes clear that the court must have the complaint before it when it passes on an ex parte motion for attachment and that the motion must be acted upon before it is served on defendant.

Rule 4A(g) is amended to make clear that an ex parte attachment obtained under Rule 4A(f) may be quashed by a person other than the defendant if that person has an interest in the property.

Advisory Committee's Note
September 1, 1980

This rule is amended to conform to statutory requirements. The Uniform Consumer Credit Code, 9-A M.R.S.A. § 5.104, expressly forbids attachment or garnishment before judgment "in an action against the consumer for debt arising from a consumer credit transaction." A creditor authorizing such a procedure may be subject to penalties under 9-A M.R.S.A. § 5.201. A consumer credit transaction is defined by 9-A M.R.S.A. § 1.301(12) as "a consumer credit sale, consumer lease or consumer loan or a modification thereof including a refinancing, consolidation or deferral." Definitions of "consumer credit sale", "consumer lease", and "consumer loan", §§ 1.301(11), (13), (14), make clear that these are non-business transactions.

Advisory Committee's Note
April 15, 1975

This amendment cures a practical problem that has arisen in the use of Rules 4A and 4B. A comparable change is being made simultaneously in the latter rule. These amendments will be applicable in the District Court as well, because the Civil Rules are incorporated by District Court Rules 4A and 4B.

Rules 4A and 4B as originally promulgated and as amended in 1973 treated attachment and trustee process as incident to the commencement of an action. Accordingly, subsequent attachment was available under Rules 4A(e) and 4B(g) only when such process had been employed at the outset. Since under the amended rules neither property nor credits of any kind may be attached without hearing and consequent expense and delay, it is no longer feasible for plaintiffs to commence virtually every action with an attachment, as was common in prior practice. A plaintiff who has not attached, however, has no protection against changes in the debtor's financial position and is unable to attach assets discovered or acquired after the action is commenced. The present amendments to Rules 4A and 4B are intended to remedy that situation by making attachment and trustee process available in circumstances where they are otherwise appropriate not only at the commencement of the action but at any time during the pendency of the action in the Superior Court.

Rule 4A(a) is amended to eliminate the limitation of attachment to the commencement of the action.

Rule 4A(c) is amended to provide that to approve an attachment the courts must find that the plaintiff is likely to recover an amount in excess not only of defendant's liability insurance but of any other attachments under this rule or Rule 4B. The new provision applies whether other attachments have been made previously or are being made simultaneously with. the attachment before the court. The amendment thus requires an aggregating of all assets available that was not required in former practice. The effect is to prevent plaintiffs from combining a series of motions for attachment and trustee process that would encumber more of defendant's assets than are necessary to secure the judgment.

Amended Rule 4A(e) provides for two distinct types of attachment after the action has commenced. "Subsequent" attachment may be approved by the court at any time, if no attachment has previously issued under this rule. "Additional"

attachment may be approved if attachment has previously issued either at the commencement of the action. under subdivisions (c) or (f) or subsequently or additionally under this subdivision. As under former Rule 4A(3), "additional" attachment is appropriate only after expiration of the time for making an attachment already issued. Other changes in the subdivision make clear that the motion .and findings upon which the court may approve subsequent or additional attachment are the same as those required at the commencement of the action. The motion may either be on notice under subdivision (c) or ex parte under subdivision (f) according to the circumstances of the case. The only difference with procedure at the commencement of the action is that, under the present subdivision, notice to the defendant if otherwise required may be given under Rule 5 rather than Rule 4, because he has already appeared.

The amendment is silent as to the availability of subsequent or additional attachment after judgment and pending appeal. Although an order of attachment presumably may be granted during the automatic 30-day stay of execution provided by Rule 62(a) and thereafter if an appeal is taken, an order for immediate execution or bond in lieu thereof under Rule 62(c), or commencement of disclosure proceedings under 14 M.R.S.A. § 3121 *et seq*., may be more effective remedies. If there is an appeal, the power of the Superior. Court to act is terminated by the transmission of the record to the Law Court under Rule 74(p). In an extreme situation, however, the Law Court might be persuaded to exercise its inherent power, reserved under Rule 62(g), "to preserve . . . the effectiveness of the judgment." On remand to the Superior Court for new trial, that court regains the power to order subsequent or additional attachment under amended Rule 4A(e).

Rule 4A(f) is amended for consistency with the amendment of Rule 4A(c). At the same time subdivision (f) is amended to provide that an ex parte order for attachment is available if "there is a clear danger that the defendant if notified in advance of attachment of the property will . . . make it unavailable to satisfy a judgment." The quoted language is from item (ii) as amended and recognizes the practical fact that the defendant if forewarned may sell or encumber the property. The amendment generalizes on the occasions (previously only threatened removal from the state, concealment or destruction) when an attachment may be obtained without notice to the defendant. Both the affidavit filed with a motion for such an ex parte order and also the finding of the court should identify with specificity the nature of the action the defendant is in danger of taking if forewarned.

Advisory Committee's Note
August 1, 1973

These amendments, and the simultaneous amendments of Form 2, Alternate Form 2, and Forms 2D through 2G, are made for the purpose of applying to real estate attachments the identical procedures required on personal property attachments by the amendments which became effective on January 1, 1973. Those January 1, 1973, amendments, as explained in the accompanying Advisory Committee's Notes, did not go beyond the requirements of the cases previously decided in the First Circuit. At that time *Gunter v. Merchants Warren Nat. Bank,* 360 F.Supp. 1085 (D.Me.1973), testing the constitutionality of the Maine real estate attachment procedure, was pending before a three-judge district court in the District of Maine. On June 25, 1973, that court decided the *Gunter* case and a companion case, *Lake Arrowhead Estates, Inc. v. Cumming,* 360 F.Supp. 1085 (D.Me.1973), holding that a defendant is constitutionally entitled to the same prior notice and opportunity to be heard on a real estate attachment as on a personal property attachment and on trustee process. The present amendment brings the real estate attachment procedure into conformity with the requirements of due process as construed by the three-judge federal district court. All of the procedures which previously applied only to "attachments of property other than real estate" will hereafter apply generally to "attachments".

Advisory Committee Note
January 1, 1973

The amendment of this rule, as well as the simultaneous amendments to Rule 4B, Rule, 64 and the associated official forms, are made for the purpose of complying with the constitutional requirement of notice and hearing on mesne process as recently laid down by the United States Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) [rehearing denied 409 U.S. 902, 93 S.Ct. 177, 34 L.Ed.2d 165], and subsequent decisions of three-judge federal district courts in the First Circuit, namely, *McClellan v. Commercial Credit Corp.*, 350 F.Supp. 1013 (D.R.I.1972) [affirmed *sub nom. Georges v. McClellan,* 409 U.S. 1120, 93 S.Ct. 935, 35 L.Ed.2d 253 (1973)], and *Schneider v. Margossian*, 349 F.Supp. 741 (D.Mass.1972) . Each of those cases --*Fuentes* (replevin), *McClellan* (tangible personal property attachment) and *Schneider* (trustee process)--held that mesne process of a type similar to that used in Maine was constitutionally deficient for failure to give the defendant notice and opportunity to be heard. There is now pending before a three-judge district court in the District of Maine a case testing the constitutionality of real estate attachments in Maine, which attachments by recording in registries of deeds have continued to be made, at least in Cumberland County and some other counties of

the State. *Gunter v. Merchants Warren Nat. Bank*, Civil Action Docket No. 13-117, now pending in the District of Maine (real estate attachment) [360 F.Supp. 1085 (1973)].

The constitutional deficiency of the existing rules in regard to personal property attachment, trustee process and replevin cannot be ignored, and the pertinent rules are here promptly amended in order to provide the notice and hearing that are constitutionally required. The amendments do not, however, go beyond the requirements of the decided cases. The amendment of Rule 4A does not modify the procedures for making real estate attachments. *Fuentes* and the cases thus far decided in the First Circuit do not in terms outlaw real estate attachments which do not disturb the defendant's possession. of the attached property. The Committee also wishes to avoid causing any prejudice to either party in the pending *Gunter* case, *supra*. No inference, one way or the other, as to the views of members of this Committee on the merits of the *Gunter* case is to be drawn from the retention of the present rule as to real estate attachments.

Furthermore, the amendments of these rules do not go beyond the decided cases in that they do not completely eliminate personal property attachment or trustee process, as has been urged upon the Committee by some members of the Bar. These mesne attachment procedures have been a part of the legislative policy of Maine and Massachusetts since the Colonial Ordinances of the 17th Century (*see* the history of attachment in Massachusetts and Maine set forth in *McInnes v. McKay*, 127 Me. 110, 141 A. 699 (1928), *affirmed McKay v. McInnes*, 279 U.S. 820, 49 S.Ct. 344, 73 L.Ed. 975 (1929), limited in *Fuentes*, *supra* at n. 23), and were reexamined as recently as the 1971 Legislature, L.D. 1614, after *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), had held trustee process of wages without prior notice and hearing to be unconstitutional. This matter will almost certainly be the subject of debate in the 1973 Legislature where the whole policy question may be fully debated in committee hearings and on the floor of the two houses by interested members of the public.

The finding which the Superior Court justice must make before approving attachment of property other than real estate is "that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment . . . ." This finding wraps into itself both a finding of probable cause to believe that the plaintiff will succeed

on the merits of the dispute and a finding that the attachment is reasonable in amount. The *Fuentes, McClellan* and *Schneider* cases, *supra*, do not require any greater showing. The *Fuentes* case at footnote 33 states:

"Leeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing in preventing seizures of goods where the party seeking the writ has *little probability of succeeding on the merits of the dispute*." (Emphasis added)

Immediately thereafter the *Fuentes* decision quotes with approval the concurring opinion of Justice Harlan in the *Sniadach* case as follows:

"[D]ue process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the *probable* validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property . . . ." (First emphasis added, second in original) (92 S.Ct. at 2002-03)

Similarly the three-judge District Court in *Schneider*, holding a hearing prior to attachment on trustee process to be constitutionally required, stated:

"Absent some such justification, reflecting an 'important governmental or general public interest', however, a defendant's property could not be subject to attachment unless he had an opportunity to contest at least the *probable validity of the underlying claim* before the attachment." (Emphasis added)

There is nothing in this cases to indicate that the Constitution requires the additional showing "that there is good cause for the attachment", as required in Vermont Rule 4.1 (personal property attachment) and Vermont Rule 4.2 (trustee process). The Vermont Reporter's Note to its Rule 4.1 explained the "good cause" requirement of the rule as follows: "it may be assumed that a showing that defendant is beyond the reach of process or is about to dissipate assets or take some other step that would frustrate satisfaction of a judgment will be necessary". These showings may well be necessary to justify an ex parte order approving an attachment, as provided by the present amendments which add subdivision (f) to Rule 4A and subdivision (h) to Rule 4B, but the decided cases do not lay down any constitutional requirement of such showing in an adversary hearing on the proposed attachment.

The required finding "that there is a reasonable likelihood that the plaintiff will recover judgment, including interest and costs, in an amount equal to or

greater than the amount of the attachment" does, however, require more than a mere finding that plaintiff makes out a prima facie case or that there is probable ground to support plaintiff's claim. The defendant has an opportunity through affidavits and other evidence under oath to contradict the plaintiff's initial showing of "reasonable likelihood" through contrary evidence and through the assertion of affirmative defenses such as the statute of limitations or discharge in bankruptcy.

Also the amount of the attachment must be reduced to the extent of any liability insurance which the defendant shows is available to satisfy any judgment that may be obtained against him in the action. Although this provision of the amendment in its specificity goes beyond the decided cases, it is consistent with the constitutional requirement declared by *Fuentes* that any attachment (including its amount) be supported by a "probable cause" type finding by the court after hearing the defendant. It is the defendant that has the burden of establishing to the satisfaction of the court the amount of liability insurance that will be available. In situations where potentially there are multiple claimants against a single liability insurance fund, this showing by the defendant may be very difficult if not impossible. In Rule 4A(f) providing for ex parte approval of attachment in certain specified special situations, the plaintiff's attorney is required to certify, subject to the obligations of Rule 11, the amount of liability insurance that he knows or has reason to believe will be available.

The procedure in commencing an action will be unchanged by the amendments of Rule 4A if the plaintiff does not seek to go beyond an attachment of real estate. On the other hand, if the attachment of either tangible personal property or attachment on trustee process is desired, the new procedures as specified in the amendments to Rules 4A and 4B must be followed. In a case where one or both of those forms of attachment are sought, the action can be commenced only by the method of filing the complaint with the court, the second method specified in Rule 3. Along with the complaint there will be filed a motion for approval of the attachment supported by one or more affidavits setting forth specific facts showing that there is a reasonable likelihood that the plaintiff will recover in judgment at least as much as the attachment. In many instances the plaintiff will seek approval for both attachment of tangible personal property and attachment on trustee process. The motions for approval of both forms of attachment may be combined as a single motion and the official form that is added simultaneously with the amendment of Rules 4A and 4B, namely, Form 2D, as well as the order thereon, Form 2E contemplate the combination of both motions.

The next step will be service on the defendant of the summons and complaint, together with the motion for approval of attachment, with the supporting affidavits. A real estate attachment may also have been made even prior to filing the complaint with the court ; and if so, the copy of the writ of attachment with the officer's endorsement of the date of the real estate attachment must also be served on the defendant at the same time as the summons and complaint. The notice of hearing (see new Form 2D) also served upon the defendant will state the time and date of the hearing on the motion, which in accordance with Rule 6(d) must be not sooner than seven days after service on the defendant. Also by Rule 6(d) the defendant should file any opposing affidavits not later than one day before the hearing. The court may hear the motion on the affidavits presented by the parties, but is also authorized by Rule 43(e) to hear the matter partly on oral testimony, and, in the event that the defendant appears at the hearing with witnesses ready to testify, reasonable opportunity should be accorded the defendant to present such evidence consistent with "minimiz[ing] unnecessary cost and delay" (*Fuentes, supra*, n. 33). Upon making the required finding of "reasonable likelihood" the judge will sign the order approving the attachment, which order may combine approval of trustee process under Rule 4B. *See* Form 2E. The motion for an approval order may be granted by default if the defendant does not file counter affidavits or otherwise appear.

After court approval of the attachment and/or trustee process, the plaintiff's attorney will, as now, fill out the writ of attachment and/or the trustee summons which he has procured in blank from the clerk. However, under the amendment of Rules 4A(b) and 4B(b), both the writ of attachment and the trustee summons contain a specific recitation of the amount of attachment approved by the court, the name of the justice of the court granting the order of approval, and the date of the order. *See* the additions made to Forms 2 and 2A and Alternate Form 2 and Alternate Form 2A. Any attachment of personal property or on trustee process must be made within 30 days after the order approving the attachment subject, as at present, to the court's permitting a subsequent attachment on motion and notice and for cause shown. *See* Rule 4A(e); *cf.* Rule 4B(g). Any such order for additional attachments will of course also require the same finding of "reasonable likelihood" and may be granted ex parte on a proper showing by affidavit.

The addition of subdivision (f) to Rule 4A, and the simultaneous addition of subdivision (h) to Rule 4B, make a limited exception to the constitutional requirements for notice and hearing where necessary to serve an important governmental or general public interest. *Fuentes* recognized, at note 23, that no notice and hearing are required where the defendant is not subject to personal

jurisdiction of the courts of the state so that attachment is necessary for the state court to secure quasi-in-rem jurisdiction, called by *Fuentes* "clearly a most basic and important public interest." *Fuentes* cited *Ownbey v. Morgan*, 256 U.S. 94, 41 S.Ct. 433, 65 L.Ed. 837 (1921). The *Ownbey* case involved the situation where the defendant could not be served personally within the state. Our Maine "long arm" statute substantially extends the jurisdiction of Maine courts over out-of-state defendants as to causes of action having the required nexus with Maine, *see* 1 *Maine Civil Practice* § 4.10, and in the same measure restricts the availability of ex parte attachment orders. Although Rule 4A (f)(i) speaks of "the person of the defendant", obviously the defendant may be a corporation and an ex parte order for attachment may be rendered against a corporate defendant which is beyond the personal jurisdiction of the court. Very recently the Delaware Chancery Court, citing *Fuentes* and also *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113, 119 (1971) [conformed to 329 F.Supp. 844 (D.Conn.)], which recognized "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event," held that the state's interest in aiding its citizens in prosecuting claims against nonresidents with property in the state justified ex parte attachment of Delaware property owned by a foreign corporation sued in a stockholder's derivative suit. *Gordon v. Michel*, 41 U.S.L.W. 2264 (Del.Chan.Ct., Oct. 24, 1972). Prior notice and hearing would, the Delaware court said, permit the defendant to defeat a "most basic and important public interest." *Ibid.*

Under Rules 4A(f) and 4B(h) the second ground for permitting an ex parte order of approval, that is, where there is a clear danger that the defendant will conceal the property to be attached or will remove it from the state if given prior notice of the attachment, has much the same purpose as the old *ne exeat* writ, namely, the protection of the power of the court to enforce a judgment in the action. The *Fuentes* case, in recognizing that special situations may demand prompt action, points by way of illustration to "cases in which a creditor could make a showing of immediate danger that a debtor will destroy or conceal disputed goods." (92 S.Ct. at 2000-01) The third ground stated in Rule 4A(f) for permitting an ex parte order approving an attachment is where "there is immediate danger that the defendant will damage or destroy the property to be attached."

Except for the elimination of notice to the defendant and of an adversary hearing, the procedure for obtaining ex parte an order of approval of personal property attachment or of trustee process is generally the same as for an adversary hearing. However, the plaintiff's attorney is required to certify to the court the amount of any liability insurance which he knows or has reason to believe will be

available. Furthermore the plaintiff's attorney is, in filing the motion for an ex parte order with the supporting affidavits, subject to the obligations of Rule 11; that is, he certifies "that to the best of his knowledge, information and belief there is good ground to support it." In any event, the absence of any notice to the defendant and any opportunity for him to be heard puts an extra obligation upon the court to scrutinize with particular care the affidavits presented by the plaintiff on the "reasonable likelihood" issue.

Subdivision (g) of Rule 4A, and subdivision (i) of Rule 4B, are added in order to give the defendant whose property is attached without notice an opportunity to get the plaintiff promptly into court to justify the attachment. The ex parte order approving attachment is closely analogous to a temporary restraining order issued ex parte under Rule 65(a). The defendant whose property is attached is given a similar opportunity to move its dissolution or modification, and at the hearing on that motion there is put on the plaintiff the burden of justifying any of the findings in the ex parte order which the defendant challenges by affidavit. Fairness requires that a defendant beyond the reach of process be able to challenge an ex parte attachment order without thereby submitting to personal jurisdiction, and Rule 4A(g) and Rule 4B(i) so provide. Also, the defendant whose demand bank account is trusteed on an ex parte order is given a $100 exemption representing living expenses pending the hearing on a dissolution. or modification hearing. *See* Advisory Committee's Note to Rule 4B(h).

The modification and dissolution procedures of Rule 4A(g) and Rule 4B(i) apply to personal property attachments and to attachments on ex parte orders. Real estate attachments are also made subject to modification or dissolution on an expedited hearing. These rules are in addition to any other means which are available for obtaining dissolution, modification or discharge of attachments, *see, e. g.*, 1.4 M.R.S.A. §§ 4601-13, and each of the new provisions expressly excludes any intention to abolish or limit those other remedies.

Rule 4A(h) setting forth the required contents of affidavits filed in support of motions for attachment is drawn from the comparable provision of Rule 65(a) relating to affidavits in support of motions for temporary restraining orders. Rule 4B relating to trustee process and Rule 64 relating to replevin require the same contents for affidavits filed under those rules. It is to be noted that the affidavits must set forth specific facts sufficient to warrant the required findings. Compliance with this requirement may well be difficult with reference to the danger of removal or concealment of the property. It is contemplated that the plaintiff must show specific facts applicable to the particular case and not merely

rely upon the possibility, present in every case, that the property to be attached may be removed or concealed if prior notice to the defendant is given.

Explanation of Amendment
February 1, 1960

The amendment eliminated the necessity for the officer to transcribe a complete copy of his return of service on the copy of the writ of attachment which he delivers to the defendant, often difficult and sometimes impossible to do under the usual circumstances of making a personal property attachment. All the officer need do now is indorse the writ in the appropriate space, as follows: "Writ executed on _____ (date)." A number of different dates, all of which should be indicated in the indorsement, may be involved in attachments under the same writ. Of course, if the officer does place a complete copy of his return, describing the property attached, etc., upon the copy given the defendant (as he might well do in the case of a real estate attachment), then he has more than adequately complied with the rule.

Reporter's Notes
December 1, 1959

The purpose of this rule is to preserve the essentials of existing practice with respect to attachment. Subdivision (a) incorporates existing statutory law by reference. Thus R.S.1954, Chap. 112, Sec. 24 ff. [now 14 M.R.S.A. §§ 4151 ff.] will continue to control the manner in which and extent to which attachment may be used.

The form of the writ of attachment is prescribed by subdivision (b). *See* Form 2 and Alternate Form 2 in the Appendix of Forms. The plaintiff's attorney fills out the writ and delivers the original and a copy thereof to the officer for service. When the summons and complaint are served upon the defendant, he is also to be served with a copy of the writ of attachment and the return of service thereof.* As with other process, the serving officer makes proof of service upon the original writ of attachment and returns it to the plaintiff's attorney. In substance and effect this reproduces existing practice. Although the rule requires a separate

* [Field, McKusick & Wroth note: "By virtue of the amendment of February 1, 1960, the officer's endorsement on the writ of the date of execution is sufficient." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 118 (2d ed. 1970)].

writ of attachment, summons and complaint, in contrast to the existing practice of inserting the declaration in a writ of attachment, the summons and writ of attachment might well be combined in printing so as to minimize the number of separate papers to be handled.

The amount of the attachment, as filled in by the plaintiff's attorney, should include a reasonable allowance for interest and costs. The intention is to do away with the arbitrarily fixed ad damnum of existing practice, which has the effect of attaching property of substantially greater value than the plaintiff's real expectations of recovery, and at the same time to assure an attachment sufficient in amount to satisfy the judgment, including interest and costs.

The rule prescribes a uniform time limit of 30 days from the date of the complaint for the making of an attachment, but this time is subject to enlargement under Rule 6(b). Under present law this limit is a variable one, depending upon the relationship between the date of commencement of the action and the return term.

Subdivision (d) makes it clear that attachment is available to a party bringing a counterclaim, cross-claim, or third-party complaint.

Subdivision (e) permits a subsequent attachment by order of the court after service upon the defendant. This is to cover the situation where the plaintiff's attorney later learns about property subject to attachment. It incorporates R.S.1954, Chap. 113, Sec. 20 (amended in 1959) [now 14 M.R.S.A. § 4102].

RULE 4B. TRUSTEE PROCESS

(a) Availability of Trustee Process. In any personal action under these rules except actions only for specific recovery of goods and chattels, for malicious prosecution, for slander by writing or speaking, or for assault and battery, trustee process may be used, in the manner and to the extent provided by law, but subject to the requirements of this rule, for the purpose of securing satisfaction of the judgment for damages and costs which the plaintiff may recover, provided, however, that no person shall be adjudged trustee for any amount due from that person to the defendant for earnings. The term “earnings” means compensation paid or payable for personal services, whether denominated as wages, salary, commissions, bonuses or otherwise, and includes periodic payments pursuant to a pension or retirement program. Trustee process under this rule shall not be

available before judgment in any action against a consumer for a debt arising from a consumer credit transaction as defined by Maine Consumer Credit Code.

(b) Summons to Trustee: Form. The summons to a trustee shall bear the signature or facsimile signature of the clerk, be under the seal of the court and contain the name of the court and the names of the parties, be directed to the trustee, state the name and address of the plaintiff's attorney, a specified amount for which the goods or credits of the defendant are attached on trustee process or specific goods or credits designated by the court for attachment, and the time within which these rule require the trustee to make disclosure, and shall notify the trustee that in case of failure to do so the trustee will be defaulted and adjudged trustee as alleged. The trustee summons shall also state the name of the justice or judge who entered the order approving attachment on trustee process and the date thereof.

(c) Same: Service. The trustee summons may be procured in blank from the clerk and shall be filled out by the plaintiff's attorney as provided in subdivision (b) of this rule. The trustee summons shall be served by a sheriff or a deputy within the sheriff's county. The plaintiff's attorney shall deliver to the officer making service the original trustee summons upon which to make return of service and a copy thereof for service upon the trustee. The trustee summons shall be served in like manner and with the same effect as other process.

No trustee summons may be served unless attachment on trustee process for a specified amount has been approved by order of the court. Except as provided in subdivision (i) of this rule, the order of approval may be entered only after notice to the defendant and hearing and upon a finding by the court that it is more likely than not that the plaintiff will recover judgment, including interest and costs, in an aggregate sum equal to or greater than the amount of the trustee process and any insurance, bond, or other security, and any property or credits attached by writ of attachment or by other trustee process shown by the defendant to be available to satisfy the judgment.

Trustee process shall be sought by filing with the complaint a motion for approval of attachment on trustee process. The motion shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4A(i). Except as provided in subdivision (i) of this rule, the motion and affidavit or affidavits with notice of hearing thereon shall be served upon the defendant in the manner prescribed in Rule 4 at the same time the summons and complaint are served upon the defendant.

A defendant opposing a motion for approval of attachment on trustee process shall file material in opposition as required by Rule 7(c). If the defendant is deemed to have waived all objection to the motion as provided in Rule 7(c) for failure to file opposition material within the time therein provided or as extended, the court shall, without hearing, upon a finding that the plaintiff is entitled to an attachment under the terms of this subdivision (c), enter an order of approval of attachment in an appropriate amount.

Any trustee process shall be served within 30 days after the date of the order approving the attachment. Promptly after the service of the trustee summons upon the trustee or trustees, a copy of the trustee summons with the officer's endorsement thereon of the date or dates of service shall be served upon the defendant in the manner provided in either Rule 4 or Rule 5.

(d) Approval of Limited Attachment on Trustee Process or Substituted Security.

(1) *Attachment of Specific Property.* In the order approving an attachment on trustee process, the court shall specify that the attachment is to issue solely against particular goods or credits upon a showing by the defendant (A) that the goods or credits specified are available for attachment on trustee process and would, if applied to satisfy any judgment obtained in the action, yield to the plaintiff an amount at least equal to the amount for which attachment on trustee process is approved in accordance with the criteria of subdivision (c), and (B) that the absence of such a limitation will result in hardship to the defendant.

(2) *Alternative Security for a Single Defendant.* At the hearing on a motion for approval of an attachment on trustee process against the goods or credits of a single defendant, the defendant may tender cash or bond at least equal to the amount of any attachment to be approved in accordance with the criteria of subdivision (c). If the court finds that the defendant has tendered cash in sufficient amount, it shall order that amount to be deposited with the court as provided in Rule 67 to be held as security for any judgment that the plaintiff may recover. If the court finds that the defendant has tendered a bond of sufficient amount and duration and with sufficient sureties, the court shall order the bond to be filed with the court. A surety upon a bond filed under this rule is subject to the terms and conditions of Rule 65(c). Upon such deposit or filing, the court shall further order that any prior attachment on trustee process against the defendant to satisfy a judgment on the claim for which security has been tendered shall be dissolved.

Thereafter, no further attachment on trustee process shall issue against the defendant except on motion of the plaintiff and a showing that the cash deposited or bond filed has become inadequate or unavailable to satisfy the judgment.

(3) *Single Security for Multiple Defendants*. At the hearing for approval of attachment on trustee process against the goods or credits of two or more defendants alleged to be jointly and severally liable to the plaintiff, one or more of the defendants may tender cash or bond sufficient, in the aggregate, to satisfy the total amount the plaintiff would be entitled to recover upon execution against all such defendants. Upon the findings required by paragraph (2) of this subdivision for a single defendant, the court may order the cash to be deposited or the bond filed with the court on the same conditions and with the same effect provided in that paragraph.

(e) Disclosure by Trustee; Subsequent Proceedings. A trustee shall serve that trustee's disclosure under oath within 20 days after the service of the trustee summons upon that trustee, unless the court otherwise directs. The proceedings after service of the trustee's disclosure shall be as provided by law. When a trustee reports for examination, notice thereof shall be served upon the attorney for the plaintiff, and upon motion the court shall fix a time for the disclosure to be made. Before the disclosure is presented to the court for adjudication, there shall be minuted upon the back thereof the name of the attorney for the plaintiff, the name of the trustee with the date of the service of the summons upon that trustee, and the docket number of the action.

(f) Adjudication and Judgment. The proceedings for adjudication on the disclosure of the trustee and for the rendition and execution of judgment and the imposition of costs shall be as provided by law.

(g) Trustee Process on Counterclaim, Cross-Claim or Third-Party Complaint. Trustee process may be used by a party bringing a counterclaim, a cross-claim, or a third-party complaint in the same manner as upon an original claim, provided that the trustee resides or, if a corporation, maintains a usual place of business, in the county where the action is pending. If the counterclaim is compulsory under Rule 13(a), the party stating it may use trustee process, even though the trustee does not reside or maintain a usual place of business in the county where the action is pending.

(h) Subsequent or Additional Trustee Process. If no trustee process has issued, or if the time period prescribed in subdivision (c) of this rule for serving

trustee process has expired, the court on motion may issue an order of approval for an additional attachment on trustee process. The provisions of subdivisions (c), (d), and (i) of this rule apply to the motion and any trustee process ordered thereunder, except that notice if appropriate shall be served upon the defendant in the manner provided in Rule 5.

(i) Ex Parte Hearings on Trustee Process. An order approving trustee process for a specified amount may be entered ex parte only in an action commenced by filing the complaint with the court together with a motion for approval of attachment on trustee process as provided in subdivision (c) of this rule. The hearing on the motion shall be held forthwith. Such order shall issue if t court finds that it is more likely than not that the plaintiff will recover judgment in an amount equal to or greater than the aggregate sum of the trustee process and any insurance, bond or other security, or property or credits attached by writ of attachment or by other trustee process known or reasonably believed to be available to satisfy the judgment and that either (i) there is a clear danger that the defendant if notified in advance of the attachment on trustee process will withdraw the goods and credits from the hands and possession of the trustee and remove them from the state or conceal them, or otherwise make them unavailable to satisfy a judgment, or (ii) there is immediate danger that the defendant will dissipate the credits, or damage or destroy the goods, to be attached on trustee process. A maximum of one hundred dollars of demand bank accounts of the defendant held by any one trustee shall, however, be exempt from trustee process approved by an ex parte order under this subdivision. The motion for an ex parte order under this subdivision shall be accompanied by a certificate by the plaintiff's attorney of the amount of any insurance, bond, or other security, and any other attachment or trustee process which the attorney knows or has reason to believe will be available to satisfy any judgment against the defendant in the action. The motion, in the filing of which the plaintiff's attorney shall be subject to the obligations of Rule 11, shall be supported by affidavit or affidavits meeting the requirements set forth in Rule 4A(i).

(j) Dissolution or Modification of Trustee Process. On 2 days' notice to the plaintiff or on such shorter notice as the court may prescribe, any person having an interest in goods or credits that have been attached on trustee process pursuant to an ex parte order under subdivision (h) of this rule may appear, without thereby submitting to the personal jurisdiction of the court, and move the dissolution or modification of the trustee process, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. At such

hearing the plaintiff shall have the burden of justifying any finding in the ex parte order that the moving party has challenged by affidavit.

Upon motion and notice and a showing by any defendant that specific property or sufficient cash or bond is available to satisfy a judgment as provided in subdivision (d) of this rule, the court may modify an order of attachment on trustee process, whether issued ex parte or after hearing, to limit the attachment to particular goods or credits or to order cash or bond to be held by the court as security for the judgment, and to dissolve the prior attachment as to all other goods or credits of the defendant. If a prior attachment on trustee process has been perfected as to goods or credits specified in the modified order, the modified order shall relate back to the original attachment.

Nothing herein shall be construed to abolish or limit any means for obtaining dissolution, modification or discharge of trustee process that is otherwise available by law.

Author's Note

The Advisory Committee's Notes to amend Rule 4B generally refer to the nearly identical provisions of Rule 4A. The Rule 4A notes thus should be referenced to aid in interpretation of Rule 4B.

Advisory Committee's Notes
May 1, 2000

The specific statutory citation in subdivision (a) is replaced by the general reference to the Maine Consumer Credit Code so that the Rules are not impacted by statutory changes.

The term "attachment" taken from Rule 4A, is replaced by the proper reference to "trustee process."

Advisory Committee's Note
February 1, 1983

Rule 4B(i) is amended to make this rule consistent with the language contained in Rule 4A(g). The change will permit *any* person claiming an interest in goods or credits attached on trustee process to bring a motion to dissolve or modify

the trustee process. The right to bring such a motion is not limited to a party to the action.

Advisory Committee's Note
September 1, 1980

This amendment is necessary to conform to statutory requirements. See Advisory Committee's Note to simultaneous amendment of Rule 4A(a).

Advisory Committee's Note
April 15, 1975

The background and purpose of these amendments is explained in the Advisory Committee's Note to the simultaneous amendment of Rule 4A.

Rule 4B(a) is amended to eliminate the limitation of trustee process to the commencement of the action.

Amended Rule 4B(c), like amended Rule 4A(c), provides that an attachment on trustee process will not be approved unless plaintiff is likely to recover more than the aggregate amount of available liability insurance or other attachments obtained simultaneously or previously under this rule or Rule 4A. *See* Advisory Committee's Note to amendment of Rule 4A.

Rule 4B(g), like Rule 4A(e), is amended to provide for either "subsequent" or "additional" trustee process. *See* Advisory Committee's Note to amendment of Rule 4A.

Rule 4B(h) is amended for consistency with the amendment of Rule 4B(c). At the same time subdivision (h) is amended for the same reasons as the simultaneous amendment of Rule 4A(f). See Advisory Committee's Note to Rule 4A.

Advisory Committee's Note
January 1, 1973

The amendments made to this rule parallel the amendments being simultaneously made to Rule 4A relating to attachment of property other than real estate. Reference is made to the Advisory Committee's Note on the amendments to

Rule 4A for an explanation of the purpose of these amendments as well as a discussion of the procedure to be followed in making either form of attachment.

There are minor changes made in Rule 4B in addition to those which are parallel to the amendments of Rule 4A. In Rule 4B(c) the language "the person who is to make service" is changed to read "the officer making service." Under Rule 4(c) service of process, as distinguished from execution of a writ of attachment, may be made by a person other than an officer. However, it seems desirable, since trustee process is now available only after a court order, that the trustee summons be served only by an officer experienced in service procedures and informed of the requirements for the court order.

Subdivision (g) relating to subsequent trustee process is also amended to eliminate the language from the present rule reading "against the same or an additional trustee." That former language in the context of the newly required adversary hearing on whether the order approving the additional attachment should be granted would imply that the plaintiff must reveal the identity of the additional trustees. Such identification is not relevant at the due process hearing on the issue of "reasonable likelihood." Whether the plaintiff will find it necessary to identify the trustee in order to show cause for the late trustee process will depend upon the facts of each individual case.

Reference is made to the Advisory Committee's Note on Rules 4A(f) and (g), for an explanation of ex parte orders approving personal property attachments and of the provision for expeditious motions and hearings for dissolution or modification of those ex parte attachments, This explanation is equally applicable to the parallel provisions for Rules 4B(h) and (i) relating to attachments on trustee process. A special provision is, however, added to Rule 4B(h), in order to give added protection to the defendant whose demand bank account is trusteed under an ex parte order. Such a defendant may well be relying upon his bank account to take care of his current living expenses in much the same way that the wage-earner whose wages were garnished in *Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), relied on wages for living expenses. The $100 exemption applied against all demand bank accounts of the defendant held by any one bank means that the defendant will have the use of that sum in the brief period prior to an expeditious hearing on his motion under Rule 4B(i) to dissolve or modify the trustee process. It is true that a defendant with multiple bank accounts will get the benefit of multiple exemptions, but the complexities necessary to prevent this result make an attempt to do so impracticable.

The affidavit filed in support of a motion for ex parte trustee process must set forth specific facts sufficient to warrant the court's finding of one of the factual bases (either (i) or (ii) or (iii) in subdivision (h)) justifying service of trustee process prior to notice and hearing. Under the rule the court should insist on a showing of something more than the mere possibility, present in every case, that a defendant forwarned of the trustee process will withdraw a bank account or other credit and put the proceeds out of reach of process.

Furthermore, clause (iii) in speaking of "immediate danger that the defendant will *dissipate* the credits" refers to something more than normal withdrawals that the defendant would make in the ordinary course irrespective of an impending trustee process. For example, the fact that a business concern will write many payroll checks. on its bank account for its weekly payday does not by itself justify an ex parte order for immediate trustee process.

Advisory Committee's Note
September 23, 1971

Amendments to Rule 4B(a), (c), and (g), and the abrogation of Rule 4B(h), are made necessary by the enactment of 1971 Laws, ch. 408, which makes major changes in the procedure for obtaining satisfaction of a money judgment. The Act adds a new Chapter 502 to Title 14 M.R.S.A., replacing the present disclosure proceedings of Title 14 with a hearing before a judge of the District Court. Under new 14 M.R.S.A. §§ 3127-3130, the judge is empowered to order a judgment debtor to make installment payments to his creditor in an amount proportionate to his earnings, up to limits similar to those incorporated in former Rule 4B(h)(2). New 14 M.R.S.A. § 3137 permits the court to order such payments to be made directly by the employer in the event of default by the employee. Consistent with these provisions, section 2 of the Act amends 14 M.R.S.A. § 2602(6), the trustee process exemption provision, to prohibit use of trustee process against wages at any time.

The present amendments to Rule 4B eliminate provisions of the rule intended to implement state and federal statutory limitations upon the use of trustee process against earnings. *See* Advisory Committee's Notes to amendments of December 31, 1967, and ,July 1, 1970. Rule 4B(a) continues to prohibit trustee process against earnings and carries forward the broad definition of earnings contained in new 14 M.R.S.A. § 3121(1), which is substantially that of former Rule 4B(h)(3)(i). These provisions are necessary to make clear that disclosure

proceedings under new Chapter 502 are the creditor's exclusive remedy against earnings as thus defined. This is clearly the intent of the Act, although literally it exempts only the narrower "wages" under the amendment to 14 M.R.S.A. § 2602(6).

M.R.C.P. Form 2C and Alternate Form 2C, summons to trustee for earnings, as well as the parallel forms for use in the District Court, have been abrogated.

Advisory Committee's Note
July 1, 1970

The amendments to Rule 4B are made principally for two purposes: (1) To eliminate the restriction to 30 days after judgment for the service of trustee process against earnings; and (2) to write into the rule for the convenience of practicing lawyers the present practical effect of the monetary limitations imposed upon trustee process against earnings by a federal statute that goes into effect in this regard on July 1, 1970; namely, the Consumer Credit Protection Act. Also, the word "earnings" as used in the federal Act has been substituted for the phrase "wages or salary" used previously in Rule 4B.

The Committee considered but rejected as unnecessary an amendment in the last sentence of Rule 4B(c) to make clear that the thirty-day limitation upon service of trustee process used in connection with the commencement of the action against types of goods and credits other than earnings may be extended by court order under Rule 6(b). That time period, like the thirty-day period for attachments under Rule 4A(c) and all other time periods under the rules may be enlarged except as restricted under Rule 6(b) itself.

The thirty-day restriction on post-judgment trustee process against earnings is eliminated as a result of a widely held belief that the restriction served no useful purpose and often resulted in real hardship to the judgment debtor. It was reported to the Committee that in light of the thirty-day restriction collection attorneys armed with a judgment often feel compelled to demand immediate payment in full or to serve several trustee summonses against earnings in rapid succession, without leaving time to work out an accommodation. No time restriction upon use of trustee process against earnings after judgment appears in either the 1965 Maine Act which made judgment a prerequisite for such trustee process, or the federal Consumer Credit Protection Act.

Rule 4B(h)* is now divided for convenience into three paragraphs. The first paragraph incorporates the substance of the prior Rule 4B(h), substituting the phrase "at any time" for the prior phrase "during a period of thirty days", and adding to the last sentence an express requirement, that certainly was implicit previously, that the judgment plaintiff using trustee process against earnings must serve upon the judgment debtor a copy of the trustee summons with the officer's endorsement thereon of the date of service upon the trustee.

The new paragraphs (2) and (3) of Rule 4B(h) incorporate the principal provisions of title III of the federal Consumer Credit Protection Act, P.L. 90-321, 15 U.S.C.A. §§ 1671-77, which imposes certain maximum limits upon the amount of "earnings" as defined in the Act that may be garnished to satisfy a debt and forbids any state or federal court to "make, execute or enforce any order or process in violation of" the Act. Under Section 303 of the Act, 15 U.S.C.A. § 1673, the maximum amount which may be garnished is the lesser of (1) 25% of defendant's weekly disposable earnings or (2) the amount by which those earnings exceed 30 times the federal minimum hourly wage. For pay periods other than a week, the Secretary of Labor is to provide by regulation a means for computing the equivalent of the latter sum. The amended rule expresses the requirements of the Act in terms of their practical effect. A sum equal to 30 times the federal minimum wage, which would presently be $48, is exempt from attachment in any case. If earnings are between $48 and $64 a week, the excess over $48 will be less than 25% of the total, so only that excess may be attached. When earnings are more than $64 a week, 25% will be the lesser amount and hence subject to attachment.

Subparagraph (iii) of the rule simply incorporates the Secretary's regulations for pay periods other than a week. Currently, the Secretary proposes merely to multiply the weekly figure by the number of full weeks and fractions of a week in the pay period. For example, the figure for a monthly pay period would be 4 1/3 times $48 or $208. See Proposed Regulations, 29 C.F.R. Ch. V, 34 Fed.Reg. 19296-97 (Dec. 5, 1969). Present Maine law would not satisfy the standards of the federal Act. Under 14 M.R.S.A. § 2602(6) earnings at the rate of $40 per week are exempt, presumably for whatever period of time they are owed at the time of attachment. *See* 1 Field, McKusick & Wroth, *Maine Civil Practice*, 140–42 (2d ed. 1970). Under the Maine statute, if defendant had total disposable earnings of $64 for one week, $24 would be subject to attachment, while the federal Act would limit attachment to $16. While, as previously noted, the rule will supersede the

* Rule 4B(h) was abrogated September 23, 1971.

statute, it will be desirable to repeal 14 M.R.S.A. § 2602(6) as obsolete and potentially confusing. Under Section 305 of the federal Act, 15 U.S.C.A. § 1675, the Secretary may "exempt" from the statute's preemptive bar state laws with restrictions "substantially similar" to the federal provisions. While regulations governing such exemptions are not yet final (see Proposed Regulations, 29 C.F.R. Ch. V, 34 Fed.Reg. 19296–97 [Dec. 5, 1969]) one of the Consultants to the Committee has been assured by the Regional Solicitor of the Department of Labor that the proposed rule satisfies the federal requirements.

Note that Section 304 of the federal Act, 15 U.S.C.A. § 1674, forbids discharge of any employee for garnishment where only one debt is involved and imposes criminal penalties for willful violation. No rule seems appropriate or necessary to implement this provision, which is self-operating regardless of state law.

Rule 4(h)(3) incorporates verbatim the definitions of "earnings" and "disposable earnings" found in Section 302 of the federal Act, 15 U.S.C.A. § 1672. The definition of "earnings" makes clear that the entire rule applies to all forms of compensation, including payments under pension or retirement plans, thus eliminating a possible inequity. The definition of "disposable earnings" solves the otherwise difficult problem of what deductions from wages are to be included in the attachment. Those deductions "required by law to be withheld", such as income and social security taxes, are excluded, while others, such as health insurance premiums for insurance not imposed by law, are included.

The amendments of Rule 4B made to conform with and to declare the practical effect of the federal Act are derived from a Vermont rule which went into effect on May 1, 1970.

Advisory Committee's Note
December 31, 1967

The change in subdivision (a) and the addition of subdivision (h) are intended to bring the rule into conformity with the 1965 amendment of 14 M.R.S.A. § 2602(6), which prevents the use of trustee process against the wages or salary of the principal defendant for personal labor until after judgment has been obtained. Under the statute and the existing rule the plaintiff was put to the expense and trouble of an action on the judgment, and the employer served with a trustee process in the second action had no way of knowing whether or not a

prior judgment had been obtained or for how much or even that it was an action on a judgment. *See* Field and McKusick, *Maine Civil Practice*, § 4B.3 (Supp.1967).

Subdivision (h) allows the use of trustee process as a part of the principal action, but permits it to be served only during a period of 30 days after the entry of judgment therein. The proviso added to 4B(a) simply incorporates the 1965 amendment.

To accompany these changes, Form 2C and Alternate Form 2C, entitled "Summons to Trustee for Wages", are added. The forms advise the trustee of the date and amount of the judgment upon which the trustee process is based.

The provision in 4B(c) for service of trustee process upon a partnership has been rendered unnecessary in view of the addition of Rule 4(d) (10) providing for a simplified service of all process upon partnerships.

Explanation of Amendment
February 1, 1960

This amendment was promulgated at the same time and for the same reason as the amendment to Rule 4A(c) discussed above. Again the purpose is to make the task of the officer making the service less burdensome and to lessen the possibility for error.

Reporter's Notes
December 1, 1959

The purpose of this rule is to preserve existing practice with respect to trustee process. Subdivision (a) states the actions in which trustee process may be used, as set forth in R.S.1954, Chap. 114, Sec. 1 (amended in 1959) [now 14 M.R.S.A. § 2601], and incorporates existing law by reference.

Subdivision (b) prescribes the form of the summons to the trustee, which will have the effect of the present trustee writ and summons. See Form 2A and Alternate Form 2A in the Appendix of Forms.

The amount for which the defendant's goods or credits are attached should not exceed the amount named in the demand for judgment together with a reasonable allowance for interest and costs. The object is to limit the amount caught by trustee process to a value sufficient to cover the plaintiff's prospective

judgment including interest and costs. The plaintiff's attorney will fill in the summons to show the total amount attached.

Subdivision (c) calls for service upon a trustee in the manner provided for service generally, but with the proviso, taken from R.S.1954, Chap. 114, Sec. 4 [now 14 M.R.S.A. § 2603], that service upon a single partner is sufficient attachment of the defendant's property in the possession of the firm.* When the summons and complaint are served upon the defendant, he is also to be served with a copy of the trustee summons and the return of service thereof.** As with other process, the serving officer makes proof of service upon the trustee summons and returns it to the plaintiff's attorney. Practice under this rule differs from present practice in that it substitutes a summons to the trustee and a separate summons and complaint to the principal defendant for the trustee writ in which the declaration is inserted, but its practical effect is unchanged.

As in the case of attachment, this rule prescribes a uniform time limit of 30 days from the date of the complaint for the service of a trustee process, but this time is subject to enlargement under Rule 6 (b). Under present law this limit is a variable one, depending upon the relationship between the date of commencement of the action and the return term.

Subdivision (d) requires the trustee to serve his disclosure under oath within 20 days after service upon him. The form of the disclosure is very similar to that now in use. See Form 21A in the Appendix of Forms. Existing law as to subsequent proceedings is incorporated by reference. The last two sentences of this subdivision are taken from Revised Rules of Court 12.

Subdivision (e) similarly incorporates by reference existing law as to adjudication and judgment.

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* [According to Field, McKusick & Wroth, "This provision was eliminated as superfluous, effective Dec. 31, 1967. See Rule 4(d) (10)." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 131 (2d ed. 1970)].

** [According to Field, McKusick & Wroth, "by virtue of the February 1, 1960, amendment of Rule 4B(c), the officer's endorsement on the trustee summons of the date of execution is sufficient." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 131 (2d ed. 1970)].

Subdivision (f) provides for the use of trustee process by a party bringing a counterclaim, cross-claim or third-party complaint if the venue is proper as to the trustee. If the counterclaim is compulsory, trustee process may be used irrespective of where the trustee resides. The latter provision is a practical necessity in order not to force upon the counterclaiming party the disadvantage of losing his chance to get security by trustee process for any judgment he might recover. This adds to the burden of a trustee by compelling him to appear outside his own county, but he is already required to do so in cases where the action is brought in a different county in which another trustee resides. *See* R.S.1954, Chap. 114, Sec. 5 (amended in 1959) [now 14 M.R.S.A. § 2604].

Subdivision (g) provides means of obtaining a court order for an additional attachment on trustee process after service on the principal defendant. Wages or salary of the defendant cannot, however, be reached by such subsequent trustee process. Successive trustee services for this purpose will therefore be limited to the 30-day period between the commencement of the action and service upon the defendant.[***] It is believed that any further extension would place an unwarranted burden upon the wage-earner.

RULE 4C. ARREST [ABROGATED]

[Abrogated effective February 15, 1985.]

Explanation of Amendments
December 1, 1959; January 1, 1967

Rule 4C(a) was amended November 2, 1959, effective December 1, 1959, to assure the exclusion of any common-law right to arrest on mesne process.

The 1967 amendment updated the statutory reference.

Reporter's Notes

[***] [According to Field, McKusick & Wroth, "The sentence in the text should have read, 'Successive trustee services for this purpose will therefore be limited to the 30-day period after the date of the complaint. Rule 4B(c).' In any event, trustee process against wages is now limited under Rule 4B(h) to the 30-day period after entry of judgment. *See* Advisory Committee's Note and § 4B.3a below." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 132 (2d ed. 1970)].

December 1, 1959

This rule provides for arrest on a *capias* writ in the manner and to the extent provided by law.* It should be noted, however, that 1959 Laws, c. 317, §§ 55 and 56, amending R.S.1954, Chap. 120, Secs. 1 and 2 [now 14 M.R.S.A. § 3601], considerably restrict the use of arrest in civil cases. The amendment strikes out Sec. 1, which permits arrest to be made freely in tort cases, and makes Sec. 2, now limited to contract actions, govern arrest in all cases. This means that arrest in a tort case will be possible only upon the oath of the plaintiff or his attorney that he has reason to believe and does believe that the defendant is about to depart and reside beyond the limits of the state and take with him property or means of his own beyond what is needed for his immediate support. In practice arrest has been little used in contract cases, and it seems likely that under the amended statute it will also be used sparingly in tort cases.

Subdivision (c) provides for the retention in substance of the procedure under the old *ne exeat* writ under which a defendant may be arrested as a means of insuring the performance of an act, the neglect or refusal to perform which would be punishable as a contempt.

* [According to Field, McKusick & Wroth: "By a 1959 amendment the use of arrest was limited to the manner expressly provided in what is now 14 M.R.S.A. § 3601." 1 Field, McKusick & Wroth, *Maine Civil Practice* at 157 (2d ed. 1970)].